Supreme Court of the United States

OCTOBER TERM, 1966

No. 831

FRANCIS EDDIE SPECHT, PETITIONER

vs.

WAYNE K. PATTERSON, WARDEN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

[fol. 1]

PETITION FOR WRIT OF HABEAS CORPUS
UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

PERSONS IN STATE CUSTODY

Pursuant to Sentence Imposed in a Criminal Action

Case No. ———

[File Endorsement Omitted]

FRANCIS EDDIE SPECHT, (Colorado State Penitentiary Register Number 32140), (Colorado State Hospital Case Number 42871), PETITIONER

vs.

HARRY C. TINSLEY, Warden, Colorado State Penitentiary,

and/or

DR. CHARLES E. MEREDITH, Supt., Colorado State Hospital, RESPONDENTS

PETITION FOR WRIT OF HABEAS CORPUS—
Filed March 31, 1965

1. Place of detention: Colorado State Hospital, Pueblo, Colorado, having been transferred from the Colorado State Penitentiary, Canon City, Colorado, on the date of May 4, 1964.

2. Name and location of court which imposed sentence: Jefferson County District Court, Golden, Colorado, Colorado 1st Judicial District.

3. The case number in which, and the offense for which, sentence was imposed: Criminal Action No. 2667; the charge was Indecent Liberties.

4. The date upon which sentence was imposed: November 23, 1959; sentenced on one count only.

5. A finding of guilty was made after a plea of not guilty.

6. The finding of guilty after a plea of not guilty was made by a jury.

7. Petitioner did not appeal from the judgment of conviction or the imposition of sentence.

8. Answered by (7).

9. If you answered "no" to (7), state your reasons for not so appealing: Counsel for petitioner misinterpreted [fol. 2] the possible results of C. R. S. '53, 39-19-1 and 39-19-2 (1960 Perm. Supp.). Counsel stated that "An appeal would be useless to you at this point (Nov. of 1959) because you will be free before such an appeal could be heard under the sentencing terms".

10. State concisely the grounds on which you base your allegations that you are being held in custody unlawfully:

(a) Petitioner was sentenced pursuant to the Colorado Sex Offenders Act (C. R. S. '53, 39-19-1 and 2; 1960 Perm. Supp.), although he was charged, tried and convicted pursuant to C. R. S. '53, 40-2-32, only; petitioner also was tried, charged and convicted on a completed act and an attempt in the same count of the Information; all of which is in violation of petitioner's rights to equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article II, Section 25 of the Colorado Constitution.

(b) Sentencing under the Sex Offenders Act is cruel and unusual punishment within the Eighth Amendment to the Constitution of the United States and Article II, Section 20 of the Colorado Constitution.

(c) Article III of the Colorado Constitution prohibits sentencing under the Sex Offenders Act, because the said Act unlawfully delegates legislative power to the judiciary and unlawfully delegates power to the Executive Branch (The Colorado State Board of Parole) of the state government in violation of due process of law under the Fourteenth Amendment to the United States Constitution.

(d) Sentencing under the Sex Offenders Act violates petitioner's rights to equal protection and due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article II, Section 25 of the Colorado Constitution.

(e) Petitioner has been held under unlawful and illegal restraint since the date of October 15, 1964, date of the maximum sentence possible under the crime with which he was charged, tried and convicted, in violation of equal protection and due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article II, Section 25 of the Colorado Constitution.

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

[fol. 3] PREFATORY STATEMENT

Petitioner is in physical custody of Respondent Meredith, having been transferred to the Colorado State Hospital from the Colorado State Penitentiary on May 4, 1964; petitioner is in technical custody of Respondent Tinsley as petitioner was originally sentenced to the penitentiary; the transfer of petitioner was effected by Executive Order.

Attached to this brief and made a part hereof are the following: The Opinion Below, *Specht* v. *People*, (citation unknown), Colorado State Supreme Court Case No. 21260, decided November 14, 1964, marked Exhibit A; Denial of Petition for a Writ of Mandamus, marked Exhibit B; the jury verdict in the original case, Criminal Action No. 2667, Jefferson County District Court, State of Colorado, marked Exhibit C; and Denial of Petition for Re-Hearing in Colorado Supreme Court Case No. 21260, marked Exhibit D.

(a) Petitioner was charged, tried and convicted pursuant to an Information couched in the general language of C. R. S. '53 40-2-32 (Exhibit A, p. 2); he was sentenced pursuant to C. R. S. '53, 39-19-1 and 39-19-2 in the Minute Order of Sentence in the

case, this being the first two sections of the so-called Sex Offenders Act. C. R. S. '53, 40-2-32 carries no minimum and a maximum of ten years imprisonment; the Sex Offenders Act carries a minimum of one day and a maximum of life. Petitioner has previously brought up in all pleadings the mandate of C. R. S. '53, 39-12-1, which has consistently been ignored by the several Courts of Colorado. This reads, in pertinent part:

> "When a convict is sentenced to the state penitentiary, otherwise than for life, the court imposing the sentence shall not fix a definite term of imprisonment, but *shall* establish a maximum and minimum term of imprisonment. *The maximum term shall not be longer than the longest term fixed by law for the punishment of the offense of which he was convicted,* * * *." (Emphasis added.)

This statute was in full force and effect at the time of sentencing of petitioner and is in full force and effect today, not having been amended or altered in any way. The trial Court invoked the terms of C. R. S. '53, 39-19-1 (1960 Perm. Supp.) to apply the Sex Offenders Act to petitioner. It has been the contention of petitioner that the trial Court lacked authority to exercise its discretion and apply a sen-
[fol. 4] tence procedure to him carrying a far greater maximum than that of the crime with which he was charged, tried and convicted. Further, C. R. S. '53, 39-19-1 et seq. (1960 Perm. Supp.) carries a life maximum for four different crimes carrying a maximum of 10, 14, 20 and 20 years respectively. This very obviously is not equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States. Further, it is settled case law in Colorado that one has a right to be tried on the offense in the Information and no other. *Gill* v. *People*, 139 Colo. 401, 339 P. (2d) 1000, at 416 (Colo.); *Stull* v. *People*, 140 Colo. 278, 344 P. (2d) 455, at 283 (Colo.); and *Ciccarelli* v. *People*,

147 Colo. 413, 364 P. (2d) 368, at 417 (Colo.). The Attorney General of Colorado, in *Specht* v. *Tinsley*, —— Colo. ——, 385 P. (2d) 423, made the following admission in his Answer Brief, at page 3: "It is clear that * * * he (petitioner) was sentenced pursuant to the sex offenders act, *which act does not contemplate a charge, trial or conviction*, * * *." (Parenthetical word and emphasis added.) No more need be said, in the opinion of petitioner, as to lack of due process of law, even though this particular admitted point was not ruled upon in the decision.

Petitioner is a layman and does not have access to a large reference law library. The point that one cannot be convicted of both an attempt and a completed act in the same transaction was not readily available to him when he first started court proceedings in an attempt to secure a proper adjudication of his rights. However, it has been settled case law in Colorado for many years that one cannot be found guilty of both enticement and attempting to take immodest, immoral and indecent liberties, and enticement and taking immodest, immoral and indecent liberties. *Martinez* v. *People*, 111 Colo. 52, 137 P. (2d) 690, reaffirmed in *Lewis* v. *People*, 124 Colo. 62, 235 P. (2d) 348. In the Opinion Below (Exhibit A), the Colorado Supreme Court admits this fact but emphasizes the fact that The People can *charge* an accused with the two offenses, but that one cannot be found *guilty* of both an attempt and a completed act. It is rather amazing that the Court did recite the Information in the cause almost verbatim, omitting extraneous wordage (Exhibit A, p. 2) and then did render the opinion that it did. It was admitted that: "* * * it is true that the information charged [fol. 5] three offenses in *one* count * * *." (Emphasis added; Exhibit A, p. 5). It was further admitted: "* * * and (2) it charges three offenses in *one* count." (Emphasis added; Ex. A, p. 4). It is thus established that among the three offenses were: (1) enticement and *attempting* to take immodest * * * liberties, and (2) enticement and *taking* immodest * * * liberties.

On page 5 of Exhibit A, it is said: "The record discloses neither a timely objection, * * *"; so it is quite evident that the record in the case was before the Supreme Court at the time of deliberation of the issues. However, for the benefit of this Honorable Court, petitioner has obtained a certified copy of the jury's verdict, marked Exhibit C, which discloses that petitioner was "guilty as charged". From the foregoing it is patent that petitioner has been denied Equal Protection of the Laws under the Fourteenth Amendment to the United States Constitution and Article II, Section 25 of the Colorado Constitution under the cloak of Colorado case law that has stood the test of time. *Martinez* v. *People*, supra, and *Lewis* v. *People*, supra, have neither been overturned; in fact, *Martinez*, supra, was reaffirmed in the Opinion Below (Exhibit A).

Despite the fact that the Opinion Below was an *en banc* decision of the Colorado Supreme Court and no petition for re-hearing was necessary, petitioner did file for the same in order to give the Colorado Supreme Court an opportunity to correct its erroneous decision, pointing out specifically in the record where he had argued that he had been *charged*, tried and *convicted* of an attempt and a completed act in the same transaction, contrary to long-standing rulings of the Colorado Supreme Court. This was denied by the Colorado Supreme Court (Exhibit D). It appears that the several Courts of Colorado are engaged in an attempt to keep the petitioner on a legal merry-go-round on technical issues that will not stand searching scrutiny.

From the facts set forth above, the Writ of Habeas Corpus should issue and be made absolute.

(b) Petitioner makes the contention that the Colorado Sex Offenders Act (C. R. S. '53, 39-19-1 et seq., 1960 Perm. Supp.) is in violation of the Eighth Amendment to the United States Constitution and Article II, Section 20 of the Colorado Constitution. Both are verbatim and relate to "cruel and unusual punishments". The Eighth Amendment was made

[fol. 6] applicable upon the States by reason of the Due Process Clause of the Fourteenth Amendment in the celebrated opinion of Mr. Justice Stewart in *Robinson* v. *State of California*, 82 S. Ct. 1417 (decided June 25, 1962). The classification found in C. R. S. '53, 39-19-1 (1960 Perm. Supp.) states that the trial court may, in its discretion, dismiss any one of the charges of which a person has been found guilty if, *in the opinion of the trial court*, such person poses a threat of bodily harm to the public, if at large, or is an habitual offender *and* mentally ill. (Emphasis added). The first classification is standard for anyone standing before the Bar. The second part is intertwined as one classification by use of the word, "and". It is needless to expound on the classification of "an habitual offender" as this does not and cannot apply to petitioner. The use of the term, "mentally ill", is of paramount importance relative to a claim of abridgment of rights existing under the Eighth Amendment. Under C. R. S. '53, 39-19-1 (1960 Perm. Supp.), a mere "finding of fact" by one man, the trial Court, is all that is required to declare a man to be "mentally ill" in Colorado! There is no hearing in open court; one cannot question adverse witnesses; no reports are open to him. It is admitted that petitioner did have an examination period (required under C. R. S. '53, 39-19-2) at the Colorado Psychopathic Hospital, but the reports of the doctor(s) or psychiatrist(s) were never made available to petitioner; he was unable to cross-examine the psychiatrist(s) in the case. In Court, counsel for petitioner and the District Attorney were reading the Hospital's report; petitioner attempted to read the same over his counsel's shoulder; the Court, the Hon. Marshall Quiat, admonished petitioner: "Mr. Specht, that report is solely for your counsel and the District Attorney!" Behind this legal iron curtain of secrecy, petitioner was then sentenced pursuant to C. R. S. '53, 39-19-1 and 2 (1960 Perm. Supp.).

It has been the contention of various legal authorities of Colorado that the trial Court does not deter-

mine the "classification" that such is laid out in the Act and the trial Court merely makes a finding of fact to determine whether the convicted person comes within the purview of this "classification". In our humble opinion, a "classification" must be proved in open court, such is done after a person is charged with being an habitual criminal; further, a "finding [fol. 7] of fact" is but the opinion of one man, unsupported by any legal authority to sustain its findings. It is the contention of petitioner that such an important question whether a person is mentally ill or not is not a proper question to be left to the determination of the trial Court under the aegis of a "finding of fact". This is a violation of safeguards guaranteed by the Due Process Clause of the Fourteenth Amendment. A short citation from *Robinson* v. *California*, supra, is apropos at this point to sustain petitioner's claim, at a point where Mr. Justice Stewart stated, at page 1420 (S. Ct.):

> "It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person *to be mentally ill*, a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare required that the victims of these and other afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, *a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.* See *State of Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 67 S. Ct. 374, 91 L. Ed. 422." (Emphasis added.)

Mr. Justice Douglas, concurring in *Robinson* v. *California*, supra, had this to say at p. 1425 (S. Ct.):

> "The command of the Eighth Amendment, banning 'cruel and unusual punishments', stems

from the Bill of Rights of 1688. * * * And *it is applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment.* Ibid." (Emphasis added.)

Under the express terms of C. R. S. '53, 39-19-1 (1960 Perm. Supp.), petitioner has been sentenced as "an habitual offender and mentally ill"; yet he spent more than four years in the Colorado State Penitentiary, all such time being purely punitive and as if he were sentenced under a criminal offense and none other! Petitioner maintains that this is a cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments of the United States Constitution and Article II, Section 20 of the Colorado Constitution.

This question has been before the Colorado Supreme Court twice, in *Specht* v. *Tinsley*, supra, and in the Opinion Below (Ex. A), and has brushed aside preemptorily any adjudication on this question, retreating behind their opinion in *Trueblood* v. *Tinsley*, 503, 366 P. (2d) 655, of which more will be laid out specifically under (d) hereunder.

(c) Article III of the Constitution of Colorado states:

[fol. 8] "The powers of the government of this state are divided into three distinct departments,—the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted."

Under C. R. S. '53, 40-2-32, the legislature of the State of Colorado enacted a law creating and defining the crime of Indecent Liberties with the maximum penalty set, upon conviction, at ten years in the state penitentiary. Then, the General Assembly of Colorado, in C. R. S. '53, 39-19-1 et seq. (1960 Perm. Supp.), has confided in the trial court alone, by a

"finding of fact", the power to determine whether a convicted person shall be subject to a maximum of of ten years or life in the state penitentiary. This obviously confers power upon the judiciary which lies in the legislative branch of the state government, in violation of Article III of the Colorado Constitution and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The very point raised by petitioner has been ruled upon favorably by the Colorado Supreme Court in a fairly late decision. In *Dominguez* v. *Denver*, 147 Colo. 233, 363 P. (2d) 661, it is said, at 237 (Colo.):

> "Legislation which provides 'an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of' the legislative body satisfies the constitutional requirements. *United States* v. *Petrillo*, 332 U. S. 1, 67 S. Ct. 1538, 91 L. Ed. 1877. Language which gives sufficient *notice* to the person and furnishes guides for the adjudicative process meets the test of definiteness.
>
> "But indefiniteness which leaves to officer, *court* or jury the determination of standards in a *case-by-case process invalidates legislation as being violative of due process, as contravening the mandate that an accused be advised of the nature and cause of the accusation, and as constituting an unlawful delegation of legislative power to courts or enforcement agencies. United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81. 41 S. Ct. 298, 65 L. Ed. 516. See *People* v. *Lange*, 48 Colo. 428, 110 Pac. 68; *Olinger* v. *People*, 140 Colo. 397, 344 P. (2d) 689." (Emphasis added.)

The legislative power is further extended to the executive branch of the state government, whereby under C. R. S. '53, 39-19-1 et seq. (1960 Perm. Supp.) complete power of the Colorado State Board of Parole

is exercised to determine how long, where, or when a person convicted under C. R. S. '53, 40-2-32 shall remain in confinement, although C. R. S. '53, 40-2-32, under which petitioner was charged, tried and con-
[fol. 9] victed calls for a *maximum* of ten years in the state penitentiary, made mandatory by the express terms of C. R. S. '53, 39-12-1, supra. Further, Article III of the Colorado Constitution provides that no one department of the state government shall exercise powers properly belonging to any of the two other departments "except as in this constitution expressly directed or permitted". The provisions of C. R. S. '53, 39-19-1 et seq. (1960 Perm. Supp.) are statutory, as are the statutes granting power to the Colorado State Board of Parole to determine how long and where a convicted person shall serve the indeterminate sentence stated in C. R. S. '53, 39-19-1 et seq. (1960 Perm. Supp.). These provisions are *not* expressly provided for anyplace in the Colorado Constitution.

The several Courts of Colorado, in brushing aside the claim that legislative power is unlawfully conferred upon the other branches of the Colorado State Government, refuse to look at their own rulings that sustain petitioner's claims. It is respectfully submitted that petitioner's rights existing under the Due Process Clause of the Fourteenth Amendment to the United States Constitution have been abridged not only once, but several times by the procedures entered upon.

In *Dominguez* v. *Denver*, supra, petitioner emphasized the reference to proper notice. Such was not given in this case by application of C. R. S. '53, 39-19-1 et seq. (1960 Perm. Supp.). Notice under due process of law is described in 16A C. J. S. 619, Sec. 579:

> "Due process of law in a criminal case *requires a law creating or defining the offense*, a court of competent jurisdiction, accusation in due form, *notice* and opportunity to defend, trial before an

impartial judge or jury according to established criminal procedure, and a right to be discharged unless found guilty. Where these conditions are fulfilled, there is no violation of the guaranty of due process of law. * * *" (Emphasis added.)

One of the inalienable rights under the Sixth Amendment to the Constitution of the United States is aptly described in the general rule found in 16A C. J. S., "Constitutional Law", 572, Section 569 (4):

"Due process of law has been held to mean the right to be heard. So, its essential or indispensable elements, or, according to other authority, its absolute fundamentals, or minimal requirements, are *notice* and opportunity to be heard or to defend. *The legislature is without authority to dispense with these requirements of due process;* * * *." (Emphasis added.)

The procedures described herein on page 6 at the time of sentencing of petitioner violate all of the precepts of due process and notice as given in the general rule, above. It is respectfully submitted that this [fol. 10] is in violation of the Sixth Amendment to the Constitution of the United States, made applicable upon the States by reason of the Fourteenth Amendment. *Gideon* v. *Wainwright*, 372 U. S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, (at p. 797, S. Ct.).

(d) The question whether sentencing under the Sex Offenders Act of Colorado violates petitioner's right to equal protection and due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article II, Section 25 of the Colorado Constitution has been before the several Courts of Colorado in *Specht* v. *Tinsley*, supra, and *Specht* v. *People* (Exhibit A, the Opinion Below); it has also previously been before this Honorable Court in *Specht* v. *Tinsley* (citation unknown), Civil Action No. 8288, U. S. D. C. Colo., decided January 30, 1964. The Hon. Alfred A. Arraj appointed the Hon. William D. Swenson as counsel for petitioner in the

prior hearing. The Office of the Attorney General successfully argued before this Court that the constitutional questions, especially the one under this heading, had not been presented to the several Courts of Colorado for adjudication in the form presented to this Honorable Court. Petitioner admits that he could have strayed from the strict path of argument in his opening brief to this Court and that the questions could have been presented in different form. Mr. Swenson also did a tremendous job of research on points suggested by petitioner and these also, conceivably, could not have been presented in the same form.

Petitioner thereupon did present the specific questions to the several Courts of Colorado, starting with a Motion to Vacate, Set Aside or Correct Judgment and Sentence, Pursuant to Rule 35 (b), Colo. R. Crim. P., in the District Court for Jefferson County, State of Colorado, in Criminal Action No. 2667. This was denied in due time and a Writ of Error was taken to the Supreme Court of Colorado in Case No. 21260 (Exhibit A; the Opinion Below). In every instance, the Courts of Colorado have retreated behind their opinion in *Trueblood* v. *Tinsley*, supra. The Colorado Courts have consistently refused to reexamine their findings in that case, but merely reaffirm their findings therein.

Petitioner cites the following from *Trueblood* v. *Tinsley, supra*, at p. 509 (Colo.):

> "Statutes *similar* to the one under consideration have been held not repugnant to the equal
> [fol. 11] protection provision. *State* v. *Evans*, 73 Ida. 50, 245 P. (2d) 788; *Minnesota* v. *Probate Court*, 309 U. S. 270, 60 S. Ct. 523, 84 L. Ed. 744, 126 A. L. R. 530. * * *" (Emphasis added.)

The statutes under consideration are C. R. S. '53, 39-19-1 et seq. (1960 Perm. Supp.). It has been the consistent claim of petitioner that the statutes cited from the States of Idaho and Minnesota *are not similar* to the Colorado statutes. *Trueblood* v. *Tinsley*,

supra, was a case of first impression in Colorado and the Colorado Supreme Court had to sustain its findings by rulings of sister States.

Petitioner has discovered an Act in Michigan very similar to that of Colorado—in fact, the only *similar* Act that we have been able to find—with the said Act being declared unconstitutional in the case of *People* v. *Frontczak*, 286 Mich. 51, 281 N. W. 534. In the ruling thereon, Mr. Chief Justice Wiest delivered the opinion and said, at p. 58 of 286 Mich., p. 536 of N. W.:

> "We must class it where we find it placed by its authors, and we find it in the mentioned criminal code chapter relating to judgments and sentences in criminal cases.
>
> "The attorney general contends that it is a civil proceeding and analagous to statutory inquests relative to insane prisoners, which is civil in nature.
>
> "It is obvious that in such instances the inquest bears no relation to the conviction; jurisdiction attaches because of insanity. In the instance at bar jurisdiction is not given until after conviction and the prisoner is averred to be sane and *change in confinement under sentence is contemplated, for, while undergoing hospitalization, he gets credit on his sentence.*
>
> "Hospitalization, with curative treatment and measures may be desirable but, until the law makes a sane person amenable to complusory restraint as a sex deviator, *it falls short of due process in merely providing procedure.*
>
> "Under this act defendant is under sentence for an overt sex deviation offense and, as a potential like offender, it is sought to keep him in confinement under exercise of the police power. The police power, under such circumstances, is not a civil proceeding, comparable to that in cases of insane persons." (Emphasis added.)

The Act in *Frontczak* under attack was Act No. 196, Sec. 1b, Pub. Acts 1937, Comp. Laws Supp. 1937,

Sec. 17329-2, Stat. Ann. 1938, Cum. Supp. Sec. 28.1073(1). Michigan thereupon enacted a new Act known as Michigan Penal Code, Act No. 328, Sec. 338, Pub. Acts 1931, Comp. Laws Supp. 1940, Sec. 17115-338, Stat. Ann. Sec. 28.570. This new law was attacked in *People* v. *Chapman*, 301 Mich. 584, 4 [fol. 12] N. W. (2d) 18, and held to be constitutional. It should be noted that the new law in Michigan is very similar to the Act in Minnesota, recorded in *Minnesota* v. *Probate Court*, supra. The conditions of the Act in Michigan are laid out in *People* v. *Chapman*, supra, at p. 21 (4 N. W. 2d). In Minnesota, the statute under consideration was Chapter 369 of the Laws of Minnesota of 1939, with pertinent portions of the Act being laid out by the Supreme Court of the United States in *Minnesota* v. *Probate Court*, supra, at p. 272 (U. S.), p. 525 (S. Ct.). Jurisdiction attaches *before* any criminal offense is tried or a conviction obtained; the proceedings are civil in nature; all constitutional safeguards are provided to an accused at all stages of the proceedings in both Minnesota and Michigan. These procedures are *not* similar to the Colorado Sex Offenders Act, where jurisdiction attaches *after* conviction on a criminal charge with the application of the Act being left to the discretion of the District Court. In Minnesota, it is to be noted that an accused is referred to as a "patient".

In *State* v. *Evans*, supra, the act in Idaho was held to be constitutional by virtue of the fact that the District Court could, in its discretion, sentence an offender to "less than life". Petitioner does know that the argument will immediately be propounded that the Colorado Sex Offenders Act does not provide for a "mandatory life sentence" but that the offender is sentenced from "one day to life". Who is to gainsay, under the procedures engaged in in Colorado that a sentence of from "one day to life" does not mean the latter—especially where there is no recourse to any constitutional safeguards to a person so sentenced?

In Illinois, much the same procedure is afforded a person charged with being a sexually dangerous person. Illinois Code of Criminal Procedure 1963 (effective Jan. 1, 1964), Chap. 38, Sections 105-1 thru 105-12 lists procedures much the same as those found in Chapter 369 of the Laws of Minnesota of 1939, supra. It is pertinent to note that Chapter 38, Section 105-3.01 of the Illinois Code of Criminal Procedure, 1963, specifically states that the procedure is in the nature of a civil proceeding. This Act was attacked on constitutional grounds and upheld in *People ex rel. Turnbaugh* v. *Bibb*, 252 F. 2d 217. Again, this Act is similar to the Minnesota and Mich-
[fol. 13] igan Acts, whose constitutionality have been upheld; the foregoing is not to be confused with the Act declared unconstitutional in Michigan. *People* v. *Frontczak*, supra. The conditions stated in *People* v. *Frontczak*, supra, oddly parallel events as they have occurred in petitioner's case. Procedure is all that is provided in the Colorado Sex Offenders Act and, as said in *Frontczak*, "it falls short of due process in merely providing procedure".

Petitioner respectfully submits that C. R. S. '53, 39-19-1 et seq. (1960 Perm. Supp.) is, and must be declared, unconstitutional; that the Supreme Court of Colorado, by its failure to re-examine its findings in *Trueblood* v. *Tinsely*, supra, has denied to petitioner due process and equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States; that any truly *similar* Act to that of Colorado's Sex Offenders Act must be declared to be unconstitutional in the light of the ruling in *People* v. *Frontczak*, supra.

(e) Petitioner has been held under unlawful and illegal restraint since the date of October 15, 1964, expiration date of the maximum sentence for the crime with which he was charged, tried and convicted. (The foregoing statement is limited by date only if the Colorado Sex Offenders Act attacked under [d], above, is declared to be constitutional.)

In *Specht* v. *Tinsley*, Case No. 8288, U. S. D. C. Colo., supra, the Office of the Attorney General of Colorado successfully argued that the Petition for a Writ of Habeas Corpus was premature (Jan. 30, 1964). In the ruling thereon, the Hon. Alfred A. Arraj did state, in pertinent part:

> "Respondent * * * argues, finally, that since petitioner was admittedly subject to sentencing under the Indecent Liberties Statute, which provides for a maximum imprisonment of ten years, his petition here is premature until such time as a ten year period has expired.
>
> "After a consideration of the relevant authorities, we have concluded that respondent's last contention is controlling here. Petitioner, having been convicted of the crime of Indecent Liberties is subject to a sentence of not more than ten years. That period of time has not yet elapsed, and petitioner therefore may not allege that he is *at this time* being illegally detained. * * *." (Emphasis added.)

Under Colorado law, the period of time that petitioner can be held legally *has now elapsed in full*. A ten year sentence in Colorado is served in four years, ten months, and twenty-two days (C. R. S. [fol. 14] '53, 105-4-7 and 105-4-9). Petitioner has no infractions on his record, major or minor, at either the Colorado State Penitentiary or the Colorado State Hospital, nor has he violated any of the Colorado Statutes that could cause him to be legally restrained beyond the date of October 15, 1964, e. g., C. R. S. '53, 105-4-8, 105-4-10, etc.

The Office of the Attorney General argued, before this Honorable Court, in *Specht* v. *Tinsley*, Case No. 8288, supra, that petitioner was admittedly subject to a ten year sentence under the Indecent Liberties Statute and that such sentence would not be served in full until November 23, 1969. This is fallacious reasoning, as petitioner is sure that the Office of the Attorney General of Colorado is cognizant of the "good time" provisions of Colorado laws under a crim-

inal charge. A ten year calendar sentence is served only by those convicted of first-degree murder, kidnapping with harm, and/or habitual criminal. The normal ten year sentence is served in full in the aforementioned four years, ten months, and twenty-two days *without parole* or restriction of any kind, barring an attempt at or escape or attack on prison personnel or inmates. To deny petitioner the "good time" provisions of Colorado Statutes is flagrant violation of equal protection and due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Petitioner exhausted his State's rights relative to the expiration date of his full maximum sentence by filing a Petition for a Writ of Habeas Corpus with the Pueblo County District Court which was docketed as Action No. 48298 and denied by the Court on November 4, 1964. The petitioner thereupon filed a Motion for a New Trial, pursuant to Rule 59, (a), (b), and (f), R. C. P. Colo., which was denied by the Court in due time. Petitioner had sought a Writ of Mandamus relative to this from the Supreme Court of Colorado, filed by his former Mother-in-law, Mrs. Myrtle Moon, under Power of Attorney. This was denied by the Supreme Court on November 12, 1964 (Exhibit B).

Petitioner is, and has been since October 15, 1964, being held under unlawful and illegal restraint by respondents herein. The Writ of Habeas Corpus should issue and petitioner be restored to his immediate and complete freedom.

Petitioner makes the further contention that he has never been legally sentenced under the Colorado Sex [fol. 15] Offenders Act, in which Act provision is definitely made for sentencing under C. R. S. '53, 39-19-5 (1960 Perm. Supp.), this section being entitled: "Sentebce—cost—place of confinement". In the Opinion Below (Exhibit A), it is said, at page 6 thereof:

> "Specht's last argument is * * * that he was only sentenced under its first two sections, rather than the act as a whole. * * * Further, we know

of no requirement that one must be sentenced under an act as a whole."

The Minute Order of Sentence in Criminal Action No. 2667 in the District Court of Jefferson County, State of Colorado, shows that petitioner was sentenced pursuant only to C. R. S. '53, 39-19-1 and 2. Section 1 gives the trial Court the discretion to apply the Sex Offenders Act in lieu of the original charge; Section 2 provides for psychiatric examination before sentence. Neither provides for a definite sentence. The Minute Order of Sentence was Exhibit "A" attached to the Opening Brief of Case No. 20703 in the Colorado Supreme Court. It is the contention of petitioner that he had to be sentenced specifically pursuant to C. R. S. '53, 39-19-5 (1960 Perm. Supp.), or under the Act as a whole in order to be *legally* sentenced.

Petitioner takes issue with the ruling in the Opinion Below (Exhibit A) that there is no requirement that one must be sentenced under an act as a whole. Petitioner is currently in the Colorado State Hospital in Pueblo and, with storage space at a minimum, he is lacking much of the authority he has been able to acquire. However, by reliance on memory, petitioner believes that the case of *House* v. *Mayo*, (citation unknown), rendered approximately in 1939 by the United States Supreme Court, disproves this statement, wherein the High Court of the United States declared that a person could not be sentenced piecemeal under any given statute, act or sections thereof.

Petitioner respectfully submits that he has never been *legally* sentenced under the Colorado Sex Offenders Act, C. R. S. '53, 39-19-1 et seq. (1960 Perm. Supp.), in violation of the guarantee of due process of the Fourteenth Amendment to the United States Constitution. It is but one more reason why the Writ of Habeas Corpus should issue and be made absolute.

12. Petitioner has filed previous petitions for habeas corpus with respect to this conviction.

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application.

[fol. 16]

(a) the specific nature thereof:

i. An action pursuant to the Colorado Rules of Civil Procedure.
ii. Petition for Writ of Habeas Corpus.
iii. Petition for Writ of Habeas Corpus.
iv. Petition for Writ of Error.
v. Petition for Writ of Habeas Corpus.
vi. Motion to Vacate, Set Aside or Correct Sentence and Judgment, Pursuant to Rule 35 (b), Colo. R. Crim. P.
vii. Petition for Writ of Error.
viii. Petition for Writ of Habeas Corpus.
ix. Petition for Writ of Mandamus.

(b) the name and location of the court in which each was filed:

i. Jefferson County District Court, Golden, Colorado.
ii. Jefferson County District Court, Golden, Colorado.
iii. Jefferson County District Court, Golden, Colorado.
iv. Colorado State Supreme Court, Denver, Colorado.
v. United States District Court, Denver, Colorado.
vi. Jefferson County District Court, Golden, Colorado.
vii. Colorado State Supreme Court, Denver, Colorado.
viii. Pueblo County District Court, Pueblo, Colorado.
ix. Colorado State Supreme Court, Denver, Colorado.

(c) the disposition thereof:

i. Ignored as it was an improper procedure.
ii. Denied.
iii. Denied.

iv. Judgment of lower Court affirmed.
v. Denied as premature.
vi. Denied.
vii. Judgment of lower Court affirmed.
viii. Denied.
ix. Denied.

(d) date of each such disposition:

i. Ignored; no date given.
ii. January 15, 1962.
iii. July 13, 1962.
iv. September 30, 1963.
v. January 30, 1964.

[fol. 17]

vi. March 30, 1964.
vii. November 16, 1964.
viii. November 4, 1964.
ix. November 12, 1964.

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. None.
ii. None.
iii. None.
iv. — Colo. —, 385 P. (2d) 423.
v. (Citation unknown). Civil Action No. 8288, U. S. D. C. Colo.
vi. None.
vii. (Citation unknown). Case No. 21260, Supreme Court of Colorado.
viii. None.
ix. None.

(f) did you appeal the judgment entered therein? Yes, as shown by (a) iv, (a) v, (a) vii.

14. Has any ground set forth in (10) been previously presented to this or any other court, state or federal, in any petition, motion or application which you have filed? Yes.

15. If you answered "yes" to (14), identify

(a) which grounds have been previously presented:

i. Grounds 10 (a) through (e).

(b) the proceedings in which each ground was raised:

i. Motion to Vacate, Set Aside or Correct Sentence and Judgment, Pursuant to Rule 35 (b), Colo. R. Crim. P., before the Jefferson County District Court, Golden, Colorado.

ii. On Writ of Error to the Colorado Supreme Court, Denver, Colorado, in Case No. 21260.

iii. (These grounds were presented to the United States District Court, Denver, Colorado, in Civil Action No. 8288, but were not ruled upon as they had not been presented in the same form to the several Courts of Colorado.)

16. Answered by (15).

17. Were you represented by an attorney at any time during the course of

(a) your arraignment and plea? Yes.

[fol. 18]

(b) your trial, if any? Yes.

(c) your sentencing? Yes.

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? No appeal was taken.

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes.

18. If you answered "yes" to one or more parts of (17), list

(a) the name and address of each attorney who represented you:

i. Mr. Victor E. DeMouth, 710 14th Street, Golden, Colorado.
ii. Mr. William D. Swenson, 1340 Denver Club Building, Denver, Colorado.

(b) the proceedings at which each such attorney represented you:

i. Arraignment, plea, trial, and sentencing.
ii. Making the answer brief and oral argument, if any, in Civil Action No. 8288, U. S. D. C. Colo.

19. Petitoner has completed the sworn affidavit setting forth the required information in order to proceed *in forma pauperis* (with the exception of the Five Dollar filing fee, which petitioner is paying).

/s/ Francis Eddie Specht
FRANCIS EDDIE SPECHT
Petitioner

[Duly sworn to by Francis Eddie Specht. (Jurat omitted in Printing).]

[fol. 19]

[Affidavit in Support of Application for Leave to Proceed Without Prepayment of Costs. (Omitted in Printing)]

[fol. 20] EXHIBIT A TO PETITION

NO. 21260

FRANCIS EDDIE SPECHT, PLAINTIFF IN ERROR

v.

THE PEOPLE OF THE STATE OF COLORADO,
DEFENDANT IN ERROR

* * * *

Error to the District Court
of
Jefferson County

Hon. Christian D. Stoner, Judge

EN BANC JUDGMENT AFFIRMED

Plaintiff in Error,
Pro Se

Mr. Duke W. Dunbar, Attorney General,
Mr. Frank E. Hickey, Deputy Attorney General,
Mr. John E. Bush, Assistant Attorney General,
Attorneys for Defendant in Error,

MR. JUSTICE PRINGLE delivered the opinion of the Court.

[fol. 21] The plaintiff in error, Francis Eddie Specht, was convicted of the crime of indecent liberties under CRS '53, 40-2-32, and was sentenced under Chapter 122, Session Laws 1957 [CRS '53, 39-19 (1960 Perm. Supp.)], commonly called the Sex Offenders Act. He seeks reversal of the denial of his motion, pursuant to Rule 35 (b), Colo. R. Crim. P., to vacate, set aside or correct the judgment and sentence.

The information charged that Specht:

> ". . . who was then and there over the age of 14 years, did unlawfully and feloniously entice, allure and persuade a child, namely, . . . who was then and there under the age of 16 years, then and there into an office for the purpose of taking immodest, improper, immoral and indecent liberties with the person of said child; and did then and there unlawfully and feloniously take immodest, improper, immoral and indecent liberties with the person of such child, namely, the said . . .; and did then and there unlawfully and feloniously attempt to take immodest, improper, immoral and indecent liberties with the person of such child, namely, the said . . ."

He pleaded not guilty and the issue thus joined was tried to a jury, which returned a verdict of guilty. The trial court invoked the Sex Offenders Act and sent him to the Colorado Psychopathic Hospital for examination. He was thereafter sentenced to a term of not less than one day nor more than life in the State Penitentiary, under the [fol. 22] Sex Offenders Act. Specht sought and was denied habeas corpus. See *Specht* v. *Tinsley*, —— Colo. ——, 385 P.2d 423. He then filed the motion to vacate, set aside or correct judgment and sentence which is the subject matter here for review.

Specht contends that his constitutional rights have been violated because (1) he was sentenced under the Sex Offenders Act, although he was convicted of violating only CRS '53, 40-2-32; (2) sentencing under the Sex Offenders Act is cruel and unusual punishment within the Eighth Amendment to the United States Constitution and Article II, Section 20 of the Colorado Constitution; (3) Article III of the Colorado Constitution prohibits sentencing under the Sex Offenders Act, because the Sex Offenders Act unlawfully delegates legislative power to the judiciary and unlawfully delegates judicial power to the executive branch (the Parole Board); and (4) sentencing under the Sex Offenders Act violates his rights to equal protection and due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution and Article II, Section 25 of the Colorado Constitution. Despite Specht's assertions to the contrary, these contentions

have all been dealt with and disposed of in the earlier case, *Specht* v. *Tinsley*, *supra:*

[fol. 23] "Specht's several contentions pertaining to the alleged unconstitutionality of this statute have heretofore been considered and rejected by this court. See *Trueblood* v. *Tinsley*, 148 Colo. 503, 366 P.2d 655, where this very statute was held to be constitutional. Specht argues, however, that *Trueblood* v. *Tinsley*, *supra*, is 'erroneous' in that it misconstrues' certain of the cases cited therein. Suffice it to say that we adhere to our holding in the Trueblood case and conclude that CRS '53, 39-19-1 et seq. is not subject to the several constitutional infirmities suggested by Specht."

Specht next argues that one cannot be charged, as he was, with a completed act, and also with an attempt to do that act. It is true that one cannot be found *guilty* of both enticement and attempting to take immodest, immoral and indecent liberties, and enticement and taking immodest, immoral and indecent liberties. *Martinez* v. *People*, 111 Colo. 52, 137 P.2d 690. But nothing in the law prevents the People from *charging* the accused with the two offenses.

Two problems with the information remain: (1) instead of precisely following the statutory language, it charges the taking of "immodest, *improper*, immoral and indecent liberties," (emphasis added) and (2) it charges three offenses in one count. If the word "improper" were stricken, the information would then read precisely in accordance with the statute. Averments which are not necessary to [fol. 24] a sufficient description of the offense may be stricken as surplusage. *State ex rel. Leichner* v. *Alvis*, 114 N.E.2d 861 (Ohio App.). As to Specht's second attack with respect to the form of the information, it is true that the information charged three offenses in one count and was therefore clearly duplicitous. Review on grounds of duplicity is proper only by writ of error to the conviction and not by means of Rule 35, Colo. R. Crim. P. And even on writ of error, an attack on the ground of duplicity is only a matter of form, and must be made

before trial. *Russell* v. *People*, —— Colo. ——, 395 P.2d 16; *Warren* v. *People*, 121 Colo. 118, 213 P.2d 381; Rule 12 (b), Colo. R. Crim. P. The record discloses neither a timely objection, nor that the defendant was misled as to the charges against him.

Specht also argues that the offenses defined in CRS '53, 40-2-32 are not clearly expressed in its title, as required by Article V, Section 21 of the Colorado Constitution. Specht is mistaken in his belief that the words "Assault on a child under sixteen" as a headnote to the pertinent section of the statute in CRS '53 constitute its title for the purposes of Article V, Section 21. The Constitution refers to the title of a bill as it is presented to the legis- [fol. 25] lature. The headnote to CRS '53, 40-2-32 has no relation to that title. Even if the title to the bill had been defective, the passage by the legislature of the official report of the committee on statutory revision, creating Colorado Revised Statutes 1953, cured any defect, because the statute as re-enacted was thereafter, alone the law. *Tinsley* v. *Crespin*, 137 Colo. 302, 324 P.2d 1033; CRS '53, 135-4-2.

Specht's last argument is that he was never informed by the Court of the possibility that he might be sentenced under the Sex Offenders Act, and that he was only sentenced under its first two sections, rather than under the act as a whole. We know of no requirement that a defendant be advised by the Court of the possible sentence when he pleads *not* guilty. Further, we know of no requirement that one must be sentenced under an act as a whole.

The judgment is affirmed.

MR. JUSTICE HALL not participating.

[fol. 26] EXHIBIT B TO PETITION

Clerk's Office

SUPREME COURT
STATE OF COLORADO
DENVER, 80202

November 12, 1964

Filed, United States District Court, Denver, Colorado, Mar. 31, 1965

G. WALTER BOWMAN, Clerk

Mrs. Myrtle Moon,
1176 So. Lincoln St.,
Denver, Colorado 80210

Dear Madam:

The motion of Francis Eddie Specht for leave to proceed in forma pauperis, presented by you, in the above numbered and titled case, was granted today. The petition for a writ of mandamus in the case was denied and the case ordered dismissed.

The court has instructed me to advise you that no person is allowed to appear for another in this court unless duly licensed to practice law in the State of Colorado, even though such person may have a power of attorney. Anyone so attempting to proceed without a license to practice law is subject to being held in contempt of court.

Yours very truly,

/s/ George A. Trout
(GEORGE A. TROUT)
Clerk.

GAT/eo
cc: Attorney General

[fol. 27] EXHIBIT C TO PETITION

IN THE DISTRICT COURT:

STATE OF COLORADO,)
) ss.
County of Jefferson)

No. 2667

Filed in the District Court of Jefferson County, Colorado
Aug. 20, 1959

* * * *

THE PEOPLE OF THE STATE OF COLORADO)
vs.) VERDICT
FRANCIS EDDIE SPECHT, DEFENDANT)

We, the Jury, duly empaneled and sworn in the above entitled cause find the Defendant, Francis Eddie Specht, guilty as charged.

/s/ William N. Brown
Foreman.

* * * *

[fol. 29] EXHIBIT D TO PETITION

Clerk's Office

SUPREME COURT
STATE OF COLORADO
DENVER 80203

December 14, 1964

Case No. 21260

SPECHT

v.

THE PEOPLE

* * * *

The Honorable Duke W. Dunbar,
Attorney General,
State Capitol,
Denver, Colorado.

Mr. Francis Eddie Specht,
Ward 71, Colorado State Hospital,
Pueblo, Colorado. 81003

Gentlemen:

The following proceedings were this day had in the above numbered and titled case:

The petition for rehearing was denied.
Remittitur issued.

Yours very truly,

GEORGE A. TROUT,
Clerk.

By /s/ Florence Walsh
Deputy Clerk.

[fol. 30]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 9082

[File Endorsement Omitted]

[Title Omitted]

SHOW CAUSE ORDER—March 31, 1965

To the above-named respondent, GREETINGS:

Whereas, a verified application for writ of habeas corpus in due form has been filed by the petitioner alleging that he is being held illegally by you; and

Whereas, upon reading the petition good cause appears:

NOW, THEREFORE, IT IS ORDERED that you, the respondent above-named, show cause by a return in writing on or before twenty days from date hereof why the petition for a writ of habeas corpus should not be granted, which said return shall be filed with the Clerk of this Court at the Post Office Building, Denver, Colorado.

It is further ORDERED that the petitioner shall, on or before ten days after the filing and serving of the return by the respondent, file a traverse to the return.

It is further ORDERED that the petitioner remain in custody and within the jurisdiction of this Court until its further order herein.

DATED at Denver, Colorado, this 31st day of March, 1965.

BY THE COURT:

/s/ Alfred A. Arraj
ALFRED A. ARRAJ
Chief Judge.

[fol. 31]

PETITION FOR WRIT OF HABEAS CORPUS
UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

Civil Action No. 9082

[File Endorsement Omitted]

[Title Omitted]

MOTION TO AMEND PETITION FOR WRIT OF HABEAS CORPUS—Filed April 13, 1965

To: THE HONORABLE ALFRED A. ARRAJ, CHIEF JUDGE, UNITED STATES DISTRICT COURT

COMES NOW the petitioner, pro se and *in forma pauperis*, in the above-entitled and numbered cause, and respectfully moves this Honorable Court for leave to amend the Petition for Writ of Habeas Corpus filed herein as shown below, for the sake of clarity.

Page 17 of the Petition for Writ of Habeas Corpus, No. 15 (b), should be amended to read:

15. (b)

iv. Ground 10 (e) was raised in a Petition for Writ of Habeas Corpus to the Pueblo County District Court in Action No. 48298.

v. Ground 10 (e) was raised in a Petition for a Writ of Mandamus in the Colorado State Supreme Court, action unnumbered (Exhibit B).

WHEREFORE, petitioner prays that this Honorable Court grant the Motion to Amend Petition as shown above to become a part of the record herein.

Respectfully submitted,

/s/ Francis Eddie Specht
FRANCIS EDDIE SPECHT
Petitioner, Pro Se

Mailing address:

Ward 71
Colorado State Hospital
Pueblo, Colorado 81003

Dated: April 12, 1965

cc: Hon. Duke W. Dunbar
Attorney General of the State of Colorado
104 State Capitol Building
Denver, Colorado 80203

[fol. 32]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 9082

[File Endorsement Omitted]

[Title Omitted]

ANSWER TO ORDER TO SHOW CAUSE—Filed April 20, 1965

COME NOW the respondents by their attorney Duke W. Dunbar, Attorney General of the State of Colorado, and pursuant to order of this Court show cause as follows why the petition should be denied:

ANSWER

1. Admit paragraphs 1, 2, 3, 4, 5, 6, 7, 12, 14, 17 and 18.

2. Deny paragraphs 9, 10 and 15.

3. Are without sufficient information to form a belief as to the truth or falsity of sub-paragraphs i, viii and ix of sub-paragraphs (a) through (f) of paragraph 13, affirmatively allege that the date of disposition of 13(d)(ii) is March, 1962, and of 13(d)(iii) is November 28, 1962, and admit the balance of paragraph 13.

4. The allegations of the petition not specifically denied are hereby denied.

ARGUMENT

The prior disposition of petitioner's petition is res judicata. Petitioner attempts to avoid the effect of this [fol. 33] Court's previous ruling by alleging that he is now entitled to his discharge. Such conclusion is premised upon his claimed right to good time and trusty time under Colorado statute. Firstly, such question is a matter of state law, over which this Court has no jurisdiction to

determine, and, secondly, his conclusion is erroneous. Petitioner has no fixed right to such credits. *Glass* v. *Tinsley*, —— Colo. ——, 388 P. 2d 249. This Court's prior determination, therefore, is dispositive of the petition.

The remaining legal questions raised have been previously determined and disposed of adversely to the petitioner and require no further response. *Trueblood* v. *Tinsley*, 148 Colo. 503, 366 P. 2d 655; *Trueblood* v. *Tinsley*, 10th Cir., 316 F. 2d 783; Cert. denied 370 U. S. 929; *Vanderhoof* v. *People*, —— Colo. ——, 380 P. 2d 903; *Specht* v. *Tinsley*, —— Colo. ——, 385 P. 2d 423; *Specht* v. *People*, —— Colo. ——, 396 P. 2d 838. The petition must, therefore, be denied.

Respectfully submitted,

DUKE W. DUNBAR
Attorney General

By /s/ John E. Bush
JOHN E. BUSH
Assistant Attorney General

[Certificate of Mailing (Omitted in Printing)]

[fol. 34]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 9082

[File Endorsement Omitted]

[Title Omitted]

TRAVERSE OF RETURN TO ORDER TO SHOW CAUSE
—Filed April 30, 1965

COMES NOW the petitioner, pro se and *in forma pauperis*, and respectfully makes reply to the Return to Order to Show Cause in the above-captioned action. Petitioner shows unto the Court as follows:

REPLY

1. Respondents are not in any position to deny the allegation of Paragraph 9 of the Petition for Writ of Habeas Corpus as this was a fact known only to the petitioner, his counsel, and his then-wife.

2. The several Courts of Colorado have failed to adjudicate the Federal Constitutional questions raised in the Petition for Writ of Habeas Corpus; the allegations raised are not res judicata in any sense of the word.

3. The allegations of the Answer to Order to Show Cause not specifically denied are hereby denied.

ARGUMENT

Paragraph 1 of the Answer makes a denial of a fact that only the petitioner, his counsel, and his then-wife were in a position to know. It was not argued in Court orally nor in any other fashion.

It is respectfully submitted that the trial Court did not have jurisdiction to sentence the petitioner pursuant to C. R. S. '53, 39-19-1 et seq. (1957 Cum. Supp., in effect at time of sentencing).

The Argument in the Answer to Order to Show Cause makes the claim that petitioner's petition is res judicata by the prior disposition of this Court and/or the several Courts of Colorado. Petitioner admits that the disposition by this Honorable Court in Civil Action No. 8288, U. S. [fol. 35] D. C., Colo. was determinative *at that time* as being premature, but that the action, by the passage of more than the proper amount of time, is no longer premature but is derelict by a period of more than six months as of this writing. In response to respondents' first paragraph of Argument, petitioner contends that this Honorable Court does have jurisdiction to hear and/or decide Federal Constitutional questions, contrary to the claims of respondents.

Glass v. *Tinsley*, —— Colo. ——, 388 P. (2d) 249, is not a point in fact with the issues in this proceeding. In fact, it is the very antithesis of the argument propounded by petitioner in his Petition for Writ of Habeas Corpus, at pages 13 and 14 thereof. *Glass* v. *Tinsley*, supra, is a case involving an escapee, which petitioner pointed out with particularity does not apply to this cause.

The final paragraph of the Argument of the Answer to Order to Show Cause makes claim that the remaining legal questions—Paragraphs 10 (a), (b), (c) and (d), and the supporting argument in Paragraphs 11 (a), (b), (c) and (d)—have been previously determined and disposed of adversely to petitioner and require no further response. The several Courts of Colorado have never arrived at a decision relative to the Federal Constitutional questions raised by petitioner; if they had, this action would not be before this Honorable Court. Petitioner calls attention to the citations on Page 2 of the Answer to Order to Show Cause and makes the allegation that none of these cases are determinative of the important Federal Constitutional questions raised by petitioner. Petitioner makes the claim that cases at point that completely refute the allegations of respondents will be found in *Minnesota* v. *Probate Court*, 309 U. S. 270, 60 S. Ct. 523, 84 L. Ed. 744, 126 A. L. R. 530; *People* v. *Chapman*, 301 Mich. 584, 4 N. W. (2d) 18; *People* v. *Frontczak*, 286 Mich. 51, 281 N. W. 534; *State ex rel. Sweezer* v. *Green*, 360

Mo. 1249, 232 S. W. (2d) 897, 24 A. L. R. (2d) 340; *People* v. *Redlich*, 402 Ill. 270, 83 N. E. (2d) 736; *Re Moulton*, 96 N. H. 370, 77 A. (2d) 26; *Application of Keddy*, 105 Cal. App. (2d) 215, 233 P. (2d) 159; and *Malone* v. *Overholzer*, (D. C. Dist. Col.) 93 F. Supp. 647. These cases also support fully the contentions of petitioner.

In reply to respondents' Answer to Order to Show Cause, your petitioner reinstates his filed habeas corpus allegations in this cause, which are made a part hereof, as if appearing hereat in full and to which reference is respectfully prayed.

Petitioner has been put to proof by the Answer to Order to Show Cause by the respondents herein and is ready at the proper time with his proofs, all in accordance to law on such matters when the proper hearing is held.

[fol. 36] Petitioner respectfully submits that the Writ of Habeas Corpus should issue, be made absolute, and petitioner restored to his rightful freedom.

Respectfully submitted,

/s/ Francis Eddie Specht
FRANCIS EDDIE SPECHT
Petitioner, Pro Se

Mailing address:

Ward 71
Colorado State Hospital
Pueblo, Colorado 81003

[Certificate of Mailing (Omitted in Printing)]

[fol. 37]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 9082

[File Endorsement Omitted]

FRANCIS EDDIE SPECHT, PETITIONER

v.

WAYNE K. PATTERSON, Warden, Colorado State Penitentiary, and/or DR. CHARLES E. MEREDITH, Supt., Colorado State Hospital, RESPONDENTS

MEMORANDUM DENYING PETITION FOR WRIT OF HABEAS CORPUS—July 21, 1965

This matter is before the Court on a petition for a writ of habeas corpus and on a motion for leave to proceed without prepayment of costs. A show cause order was issued and counsel appointed to assist petitioner. Having heard oral argument by counsel, having examined the file and being fully advised in the premises, the Court is of the opinion that the motion for leave to proceed without prepayment of costs must be granted and that the petition for a writ of habeas corpus should be denied.

It appears from the petition that petitioner is presently incarcerated in the Colorado State Hospital, Pueblo, Colorado, having been transferred there from the Colorado State Penitentiary, Canon City, Colorado, on May 4, 1964. Petitioner was found guilty by a jury upon a plea of not guilty to the offense of indecent liberties in the District Court in and for the County of Jefferson, Colorado. Sentence of not less than one day nor more than life was imposed on November 23, 1959, pursuant to the Colorado Sex Offenders Act.

[fol. 38] No direct appeal of this sentence was ever taken. Thereafter, petitioner filed an action in the trial

court pursuant to the Colorado Rules of Civil Procedure, which was ignored. On January 15, 1962, petition for a writ of habeas corpus was brought and denied by the state court, along with petitioner's request for a transcript for appeal. On July 13, 1962, a second petition for a writ of habeas corpus was brought and denied, along with another request for a free transcript. He, however, through friends was able to purchase a copy of the record, but on appeal of the second denial judgment of the trial court was affirmed. Specht v. Tinsley, 385 P. 2d 423 (Colo. 1963). A petition for a writ of habeas corpus was denied by this Court in Civil Action No. 8288 on January 30, 1964. Subsequently, a motion was made pursuant to Rule 35(b), Colorado Rules of Criminal Procedure, to vacate and set aside the judgment and sentence. This motion was denied by the trial court and affirmed by the Colorado Supreme Court in Specht v. People, 396 P. 2d 838 (Colo. 1964). Rehearing of this determination was denied by the Colorado high court on December 14, 1964.

The basic contention of the petition is that the Colorado Sex Offenders Act is unconstitutional. Petitioner alleges that sentencing under the Act constitutes cruel and unusual punishment prohibited by the Eighth Amendment of the United States Constitution, and that the Act itself is violative of the Fourteenth Amendment of the United States Constitution due process and equal protection provisions. These contentions have been considered quite thoroughly by the state courts in this and other cases. [fol. 39] Petitioner attempted to have this Court pass upon them in his prior habeas corpus petition. However, his petition was denied as being premature, for he was admittedly subject to a maximum ten year sentence under the Indecent Liberties Statute, which period had not then expired.

Ten years of his sentence have not now expired either. He seeks to persuade the Court that under the state system of accrediting "good time", he would now be eligible for release under a ten year sentence, therefore the constitutional questions are "ripe". An answer to the "good time" question requires a specific conclusion that "good time" is either a matter of "right" or is a "privilege".

This characterization we believe is clearly one for the state to make. We specifically decline to answer the question, but pass to the merits of the controversy anyway, because we believe that to be the most equitable manner in which to proceed in this particular case.

Although the arguments made by petitioner are not totally unpersuasive, we feel bound by the Circuit Court decision in Trueblood v. Tinsley, 316 F. 2d 783 (1963). The argument is made here that in Trueblood the Court did not specifically pass upon the constitutional attacks herein levied at the Colorado Sex Offenders Statute. We cannot say that we are in total disagreement with this conclusion of petitioner, but when we read Trueblood along with Trueblood v. Tinsley, 148 Colo. 503, 366 P. 2d 655 (1961) cert. den. 370 U.S. 929 (1962) cited therein, we believe that the constitutionality of the Colorado Sex Offenders Act has been determined. It is therefore,

[fol. 40] ORDERED that the motion for leave to proceed without prepayment of costs be, and the same hereby is, granted, and it is further

ORDERED that the petition for a writ of habeas corpus be, and the same hereby is, denied.

DATED at Denver, Colorado, this 21st day of July 1965.

BY THE COURT:

/s/ Alfred A. Arraj
ALFRED A. ARRAJ
Chief Judge
United States District Court

* * * *

[fol. 41]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 9082

[File Endorsement Omitted]

[Title Omitted]

NOTICE OF APPEAL TO THE CIRCUIT COURT OF THE UNITED STATES, TENTH CIRCUIT—Filed Aug. 10, 1965

COMES NOW the petitioner above-named, Francis Eddie Specht, Case Number 42871, Colorado State Hospital (register Number 32140, Colorado State Penitentiary), appearing Pro Se and In Forma Pauperis, and respectfully serves notice of appeal to the Circuit Court of the United States, Tenth Circuit, from an adverse decision of this Honorable Court by the Honorable Alfred A. Arraj, rendered on July 21, 1965.

Petitioner gives Notice of Appeal pursuant to 28 U. S. C. A. § 2106, and U. S. C. § 2255. Following is pertinent information relative to this cause:

The respondents are named in the caption, above; they will be referred to as respondent(s) where necessary. Petitioner was originally charged, tried and convicted in Criminal Action No. 2667 in the Jefferson County District Court, State of Colorado, before the Hon. Marshall Quiat. Conviction was by a jury on the charge of Indecent Liberties, pursuant to C. R. S. '53, 40-2-32. Petitioner was sentenced on November 23, 1959, pursuant to the so-called Colorado Sex Offenders Act, under C. R. S. '53, 39-19-1 and 2, as Amended (and as shown in the Minute Order of Sentence) and a sentence of one day to life was imposed. No appeal of the original sentence was ever taken.

Petitioner filed an improper action pursuant to the Colorado Rules of Civil Procedure, which was ignored. A Petition for Writ of Habeas Corpus was brought and denied by the State Court on January 15, 1962. A request

for a free transcript of the proceedings was denied. A second petition for Habeas Corpus was brought on July 13, 1962, and denied by the State Court. A second request for a free transcript was also denied but friends assisted the petitioner with small funds so that he was able to make the appeal to the Colorado Supreme Court. The [fol. 42] judgment of the lower Court was affirmed in *Specht* v. *Tinsley*, —— Colo. ——, 385 P. (2d) 423. A Petition for Writ of Habeas Corpus was denied by this Honorable Court in Civil Action No. 8288 on January 30, 1964.

Petitioner made a Motion pursuant to Rule 35 (b), Colo. R. Crim. P., to vacate and set aside the judgment and sentence, said Motion being denied by the trial Court and affirmed by the Colorado Supreme Court in *Specht* v. *People*, —— Colo. ——, 396 P. (2d) 838. Petition for Re-Hearing was denied by the Colorado Supreme Court on December 14, 1964. Petitioner then filed a Petition for a Writ of Habeas Corpus with the District Court of the United States for the District of Colorado, with the results as heretofore given in the first paragraph.

Petitioner was represented at arraignment, trial, and sentencing by the Hon. Victor E. DeMouth of Golden, Colorado. Petitioner has appeared Pro Se in all other actions instituted and sued out, with the exception of the appointment of the Hon. William D. Swenson, 1340 Denver Club Bldg., Denver, Colorado in Case No. 8288 in this Court, and the appointment of the Hon. Michael A. Williams, 1900 First Natl. Bank Bldg., Denver, Colorado, in Case No. 9082 in this Court. Mr. Williams has expressed a willingness to appear for petitioner in the Tenth Circuit Court if the Notice of Appeal is granted to petitioner. Petitioner seeks to proceed herein *in forma pauperis*, with the exception of paying the filing fee for notice of appeal; an affidavit, believed to be proper in form, is attached hereto.

The opinion of Judge Arraj in Civil Action No. 9082 is unreported as yet or, at least, is unknown to the petitioner.

Petitioner respectfully requests that this Honorable Court furnish him the following papers filed in this cause for the purpose of appeal to the Circuit Court of the United States, Tenth Circuit, *in forma pauperis:*

Petition for Writ of Habeas Corpus.
Order Appointing Attorney.
Answer to Order to Show Cause.
Motion to Amend Petition for Writ of Habeas Corpus.
Show Cause Order.
Affidavit in Support of Application for Leave to Proceed Without Prepayment of Costs.
Copy of Memorandum Opinion and Order.
Order of Court of July 21, 1965.
Certificate of Probable Cause.

Petitioner herein alleges that he has been denied the guarantees of the First Section of the Fourteenth Amendment to the Constitution of the United States pertaining [fol. 43] to the guarantees of Due Process and Equal Protection of the Laws. The questions involving the alleged violations have been presented to the several Courts of Colorado and to this Honorable Court. Petitioner herein respectfully submits that this Honorable Court erred in its Opinion of July 12, 1965, in this cause as follows:

1) The Court should have taken jurisdiction of the "good time" question presented instead of having left this to the determination of the State Courts. In an analagous case, *U. S. ex rel. Howard* v. *Ragen*, 59 F. Supp. 374, a case involving parole violation, the Court not only accepted jurisdiction of the cause, but excoriated the State Courts for their failure to obaserve the mandate of due process as denied to the petitioner therein. When hundreds of men serving a ten year sentence in Colorado (served in 4 years, 10 months, and 22 days) have been automatically released at the expiration of this period of time without ever seeing the Parole Board, it is patent that equal protection of the laws has been denied petitioner.

2) Petitioner respectfully submits that neither *Trueblood* v. *Tinsley*, 316 F. 2d 783 (1963), nor *Trueblood* v. *Tinsley*, 148 Colo. 503, 366 P. (2d) 655 (1961) is determinative of the issues presented relative to the constitutionality of the Colorado Sex Offenders Act in this cause; *Minnesota* v. *Probate Court*, 309 U. S. 270, 60 S. Ct. 523, 84 L. Ed. 744, 126 A. L. R. 530 (1940), was relied on in *Trueblood* v. *Tinsley*, (Colo.) supra, as estab-

lishing the constitutionality of the Colorado Sex Offenders Act as a "similar" statute; that *Minnesota* v. *Probate Court*, supra, is actually determinative of the issues as presented by petitioner's contentions but on a "dissimilar" and not a "similar" basis in a comparison of the two sets of statutes; that full due process and equal protection of the laws is afforded a person in Minnesota, but only provisions for procedure and no protection of due process nor equal protection of the laws is afforded a person coming within the purview of C. R. S. '53, 39-19-1 et seq., as Amended.

3) Petitioner alleges that this Honorable Court erred by failure to rule on the question whether sentencing under the Colorado Sex Offenders was violative of the Eighth Amendment to the United States Constitution. The Court dismissed this with the mention that "These contentions have been considered quite thoroughly by the *state* courts in this and other cases". (Emphasis mine.) Petitioner feels that this Honorable Court should have decided this point in the light of Federal rulings, especially *Robinson* v. *State of California*, 82 S. Ct. 1417 (1962).

In view of the foregoing, petitioner respectfully asserts [fol. 44] that good cause is shown for appeal to the United States Circuit Court of Appeals, Tenth Circuit, and petitioner respectfully requests that this Honorable Court grant that he be allowed to appeal to the Tenth Circuit Court of Appeals *in forma pauperis*.

Submitted in good faith,

/s/ Francis Eddie Specht
FRANCIS EDDIE SPECHT
Petitioner
Attorney Pro Se

Mailing address:

Ward 71
Colorado State Hospital
Pueblo, Colorado 81003

[Duly Sworn to by Francis Eddie Specht
(Jurat Omitted in Printing)]

[fol. 45]

[Motion and Affidavit in Forma Pauperis for Leave to File Appeal Without Prepayment of Fees (Omitted in Printing)]

[fol. 47]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

[File Endorsement Omitted]

[Title Omitted]

CERTIFICATE OF PROBABLE CAUSE—Aug. 23, 1965

THIS COURT, in the above-entitled proceedings, has rendered an Order denying the petition for writ of habeas corpus.

The Court certifies that there is probable cause for an appeal.

DATED at Denver, Colorado, this 23rd day of August, 1965.

BY THE COURT:

/s/ Alfred A. Arraj
ALFRED A. ARRAJ
Chief Judge

* * * *

[fol. 48]

[Order Granting Leave to File Appeal in Forma Pauperis (Omitted in Printing)]

[fol. 49]

[Clerk's Certificate (Omitted in Printing)]

[fol. 50]

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ORDER GRANTING APPELLANT LEAVE TO APPEAL IN FORMA PAUPERIS—Oct. 14, 1965

* * * * *

Before Honorable Alfred P. Murrah, Chief Judge.

This cause came on to be heard on the application of appellant for leave to docket the cause and to prosecute the appeal herein as a poor person.

On consideration whereof, and for good cause shown, it is ordered that the said application be and the same is hereby granted and that appellant may docket the cause instanter, which is accordingly done, and prosecute the appeal without being required to prepay fees or costs or to give security therefor.

It is further ordered that appellant be and he is hereby granted leave to have the appeal considered upon a certified type written transcript of the record and typewritten copies of his brief.

It now appearing that the appellant is a poor person and unable to employ counsel, it is further ordered that Michael A. Williams, Esquire, be and he is hereby designated and assigned as counsel for appellant to prosecute the appeal in this cause.

On October 14, 1965, a transcript of the record from the United States District Court for the District of Colorado was filed in the office of the Clerk of the United States Court of Appeals for the Tenth Circuit, a copy of such record is incorporated herein and made a part hereof by reference.

[fol. 51]

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

* * * *

ARGUMENT AND SUBMISSION—Jan. 7, 1966

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable John C. Pickett and Honorable Oliver Seth, Circuit Judges.

This cause came on to be heard and was argued by counsel, Michael A. Williams, Esquire, appearing for appellant, John W. Moore, Esquire, appearing for appellee. Thereupon this cause was submitted to the court.

[fol. 52]

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

* * * *

Appeal from the United States District Court
for the District of Colorado

OPINION—Feb. 21, 1966

Michael A. Williams (Gary L. Greer with him on brief) for Appellant.

John E. Bush (Duke W. Dunbar, Attorney General, and Frank E. Hickey with him on brief) for Appellees.

Before MURRAH, Chief Judge, PICKETT and SETH, Circuit Judges.

MURRAH, Chief Judge

[fol. 53] In this habeas corpus proceedings originating in the Colorado Court the petitioner challenges the constitutionality of his state imposed indeterminate sentence as a sex offender in accordance with Colorado Revised Statutes, 1963, § 39-19-1 et seq. The trial court sustained the constitutionality on the basis of prior adjudications of the Colorado Supreme Court and this court in Trueblood v. Tinsley, 316 F.2d 783.

The state readily concedes that petitioner's state remedies have been exhausted and the asserted due process and equal protection issues are open for consideration here if a decision in petitioner's favor would result in his immediate release. See McNally v. Hill, 293 U.S. 131; McGann v. Taylor, 289 F.2d 820. It is suggested, however, that even if his sentence imposed under the Colorado Sex Offender Act be adjudged invalid, he is yet subject to sentence by the Colorado court on his conviction of indecent liberties under § 40-2-32 for a term not to exceed ten years; that he has not served this term and would not therefore be entitled to his immediate release upon a favorable decision.

The conclusive answer is that his sentence was imposed in lieu of the authorized sentence of not more than ten years. While failure of the sentence he is now serving might subject him to resentence under 40-2-32, no such [fol. 54] sentence has been imposed and a favorable decision on the asserted issue would result in his immediate release on the only sentence he is now serving.

The Colorado Sex Offender Act, 39-19-2, provides in substance that no person convicted of a crime punishable in the discretion of the court under the Act shall be sentenced until a psychiatric examination has been made and a report submitted to the court of all the facts and findings together with recommendations as to whether the convicted person is treatable under the provisions of the Act and whether he should be committed or could be adequately supervised on probation. The statute does not provide or contemplate any hearing on the exercise of the discretion of the court to impose sentence under the Act in lieu of sentence authorized under 40-2-32.

On the constitutional issue the contention is to the effect that one convicted of a 40-2-32 offense is entitled to a due process hearing on the exercise of the discretion committed to the sentencing court. The constitutionality of the Act as applied to this petitioner has been twice sustained in the Colorado Supreme Court, see Specht v. People, 396 P.2d 838; Specht v. Tinsley, 385 P.2d 423. As applied to others similarly situated, it has been sustained in Trueblood v. Tinsley, 366 P.2d 655; Vanderhoof v. [fol. 54a] People, 380 P.2d 903; Sutton v. People, 397 P. 2d 746. The same contention was also before this court and decided against the petitioner in Trueblood v. Tinsley, 316 F.2d 783. Similar statutes applied under similar circumstances have also been sustained by other state courts, i.e. by the Oregon Supreme Court in State v. Dixon, 393 P.2d 204; by the Wisconsin Supreme Court in State v. Haas, 58 N.W.2d 577. The classification of this type of offender for specialized treatment has been authoritatively sustained in Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270. Our case is quite different from People v. Frontczak, 281 N. W. 534, where the condemned statute authorized confinement in addition or supplementary to the sentence imposed for the overt act offense.

We uphold the constitutionality of the Act and agree with the reasoning of the Wisconsin court in State v. Haas, supra, that petitioner was "afforded all the rights of due process at the time of trial. He was afforded the right to be heard himself and by counsel, to be advised of the nature of the charge against him, to meet the witnesses face to face and compel the attendance of witnesses in his own behalf, and to a speedy trial by an impartial jury. But, upon conviction, he is subject to whatever loss of liberty the legislature has prescribed for his crime * * *"

"There are sound practical reasons", says Mr. Justice [fol. 55] Black, "for different evidentiary rules governing trial and sentencing procedure * * *." Williams v. New York, 337 U.S. 241. In determining whether a convicted person shall receive an indeterminate sentence based upon a recognized classification or a ten year maximum sentence, the sentencing court is free to utilize investiga-

tional techniques unhampered by due process requirements. "The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due process clause would hinder if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice." Williams v. New York, supra; see also Leland v. Oregon, 343 U.S. 790.

As a distinguished psychiatrist has recently said, "Proper management of a mentally disordered offender must take account of his particular problems and needs as well as those of society." [1] It is at the point of sentencing in the judicial process that psychiatry plays its most helpful role as an aid to the court, and it is at this point that the battle of the experts is the least desirable. See Wion v. United States, 337 F.2d 230.

The judgment is affirmed.

---

[1] See Dale C. Cameron, M.D., Superintendent, St. Elizabeths Hospital, Wash., D.C., "Did He Do It? If So, How Shall He Be Managed?", Federal Probation, June 1965, Administrative Office of the United States Courts.

[fol. 56]

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JUDGMENT—Feb. 21, 1966

* * * *

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

[fol. 57]

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR REHEARING—Filed March 7, 1966

STATEMENT

This is a petition for rehearing en banc brought by Appellant Francis Eddie Specht. This Court, in a decision entered February 21, 1966, affirmed a judgment of the United States District Court for the District of Colorado denying appellant's petition for habeas corpus and sustaining the constitutionality of his state imposed indeterminate sentence as a sex offender in accordance with Colorado Revised Statutes, 1963, § 39-19-1 et seq.

PETITION

Pursuant to Tenth Circuit Rule 24 Appellant Specht respectfully petitions and requests that the appeal in this

No. 8433 be reheard by the Court en banc, and as grounds therefor briefly states the following:

(1) This Court's decision of February 21, 1966 erroneously sustained the constitutionality of the Colorado Sex Offender Act, 39-19-1 et seq.

(2) The case of *Minnesota ex rel. Pearson* v. *Probate Court*, 309 U.S. 270, relied upon by the Court in affirming the judgment below, sets standards of procedural safeguards against unconstitutional imprisonment, see Appellant's Brief, p. 15, which the Colorado statute does not meet. Cf., Opinion of the Court, Adv. Sheet, p. 3 (Feb. 21, 1966). Valid statutes from Oregon and Wisconsin cited as similar to the Colorado statute do provide for the judicial procedure lacking in the Colorado statute.

[fol. 58] (3) This Court erroneously treated Appellant's argument as an attack on the doctrine that the trial judge has discretion in determining the length of sentence within the minimum and maximum limits set by the legislature in defining a crime and prescribing punishment therefor.

(4) The Court has not considered and disposed of Appellant's contention, to wit:

> When a defendant is charged and convicted of a crime carrying a maximum sentence of ten years, he may not constitutionally be sentenced under a different statute prescribing a maximum term of life imprisonment unless he is brought within the purview of the second statute by a judicial procedure incorporating due process of law.

(5) The Court correctly decided that dangerous sex offenders may be classified for special treatment and that such classification consists with equal protection of the law. But the Court erroneously concluded that this crucial classification, which under the Colorado statute may result in a term of restraint of the person longer than that authorized for the original offense charged, may be made in the absence of a judicial proceeding and the traditional procedural safeguards embodied in due proc-

ess of law which would enable the defendant to confront and rebut the evidence used to bring him within the classification and under the jeopardy of a heavier sentence. Although the classification made by the Colorado statute does not violate equal
[fol. 59] protection, the trial court's function is to make a finding of fact, not to determine the classification. See *Vanderhoof* v. *People*, 152 Colo. 147, at 149, 380 P. 2d 903 (1963). The fact finding process should be subject to procedural safeguards inherent in the adversary system of justice even though the subsequent administration of a sentence may be non-judicial.

CERTIFICATE OF COUNSEL

Counsel for appellant hereby certify that this petition is made in good faith as to its merit and is not made vexatiously or for delay.

/s/ Michael A. Williams
/s/ Gary L. Greer
MICHAEL A. WILLIAMS
GARY L. GREER
Attorneys for Appellant

[Certificate of Service (Omitted in Printing)]

[fol. 60]

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ORDER DENYING PETITION FOR REHEARING EN BANC —March 23, 1966

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable John C. Pickett, Honorable David T. Lewis, Honorable Jean S. Breitenstein, Honorable Delmas C. Hill and Honorable Oliver Seth, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein en banc and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition for rehearing en banc be and the same is hereby denied.

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ORDER DENYING PETITION FOR REHEARING —March 23, 1966

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable John C. Pickett and Honorable Oliver Seth, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

NOTE RE MANDATE

[On April 6, 1966, the mandate of the United States Court of Appeals, in accordance with the opinion and judgment of said court, was issued to the United States District Court for the District of Colorado.]

[fol. 61]

[Clerk's Certificate (Omitted in Printing)]

[fol. 62]

SUPREME COURT OF THE UNITED STATES

No. 280 Misc., October Term, 1966

FRANCIS EDDIE SPECHT, PETITIONER

v.

WAYNE K. PATTERSON, WARDEN, ET AL.

On petition for writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—December 5, 1966

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 831 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 831

FRANCIS EDDIE SPECHT,

Petitioner,

v.

WAYNE K. PATTERSON, Warden, et al.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

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OCTOBER TERM, 1966

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Petitioner,

v.

WAYNE K. PATTERSON, Warden, et al.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

Opinion Below

There are two reported opinions of the Colorado Supreme Court relating to the constitutionality of Petitioner's imprisonment under the challenged statute. They are *Specht* v. *Tinsley,* 153 Colo. 235, 385 P.2d 423 (1963), and *Specht* v. *People,* 156 Colo. 12, 396 P.2d 838 (1964) (R. 24-27). The opinion of the United States District Court is unreported but appears in the record (R. 39-41). The opinion of the Court of Appeals (R. 48-51) is *Specht* v. *Patterson,* 357 F.2d 325 (10th Cir. 1966).

Jurisdiction

The jurisdiction of this Court was invoked pursuant to 28 U.S.C. § 1254(1) by Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. On March 31, 1965, Petitioner filed a Petition for Habeas Corpus in the United States District Court for the District of Colorado (R. 1-23). The Petition was denied without an evidentiary hearing on July 21, 1965 (R. 39-44). The judgment of the District Court was affirmed on appeal by the United States Court of Appeals for the Tenth Circuit on February 21, 1966 (R. 48-51). Petitioner's Motion for Rehearing was filed on March 7, 1966 (R. 52-54), and denied on March 23, 1966, by the Court of Appeals (R. 55). The Petition for Writ of Certiorari was filed in this Court on June 3, 1966, and the case was docketed June 6, 1966, as No. 1782 Misc., Oct. Term, 1965. On December 5, 1966, the Petition and accompanying motion for leave to proceed *in forma pauperis* were granted. *Specht* v. *Patterson*, 87 Sup. Ct. 516 (1966) (R. 57).

Question Presented

The Colorado Sex Offenders Sentencing Act allows a person convicted of a crime for which the maximum sentence is ten years to be sentenced for an indeterminate term of from one day to life upon a finding by the court that a person so convicted constitutes, if at large, a threat of bodily harm to members of the public, or is an habitual offender and mentally ill. The question presented is whether the statute is invalid under the due process clause

of the fourteenth amendment to the United States Constitution because it allows that finding to be made:

(a) Without a hearing at which the person so convicted may confront and cross-examine adverse witnesses and present evidence of his own by use of compulsory process, if necessary.

(b) On the basis of hearsay evidence which the person is not entitled to see.

Statute Involved

The Colorado Sex Offenders Sentencing Act, Colo. Sess. Laws 1953, ch. 89, §§ 1-10, at 249-52, as amended, Colo. Sess. Laws 1957, ch. 122, § 1, now COLO. REV. STAT. ANN., §§ 39-19-1 to -10 (1963) (herein called the Colorado Sex Offenders Sentencing Act or the Sex Offenders Statute).

Statement

Francis Eddie Specht was convicted by a jury in Jefferson County District Court of the crime of indecent liberties on August 20, 1959 (R. 1, 29). That crime is defined in COLO. REV. STAT. ANN., § 40-2-32 (1963), as amended, Colo. Sess. Laws 1965, ch. 131, § 1, at 505, which provides for a maximum sentence of ten years in the penitentiary. He was not sentenced under the indecent liberties statute. After his conviction, he was examined at Colorado Psychopathic Hospital, pursuant to the sex offenders statute challenged in this case. The psychiatric report was prepared and given to the trial judge (R. 7). Thereafter, on November 23, 1959, Specht was sentenced to the state penitentiary under the sex offenders statute (R. 1). The sen-

tence was for an indeterminate term of from one day to life. He remained in the state penitentiary until May 4, 1964, when he was transferred to the Colorado State Hospital.

The following additional facts pertinent to this case are stated in Paragraph 11 of Petitioner's verified habeas corpus petition (R. 3-19). The reports of the psychiatrists were made available to the court and to Petitioner's counsel, but Petitioner was never allowed to see them although he attempted to do so (R. 7). There was no hearing on the question of whether Petitioner was subject to being sentenced under the sex offenders statute (R. 7). Although these statements are the subjects of a general denial by the State, the State has never suggested that there was a hearing on whether Specht was subject to sentence under the sex offenders statute. The State has consistently maintained that the statute does not require such a hearing and that Specht is not entitled to one by reason of any requirements of due process.

Summary of Argument

In Colorado, certain sex crime convictions authorize the sentencing court to initiate procedures which may lead to sentencing under the Colorado Sex Offenders Sentencing Act. The only sentence provided for by the sex offenders statute is an indeterminate sentence of from one day to life. In 1959, the crimes enumerated in the statute were indecent liberties, incest, assault with intent to commit unnatural carnal copulation, and assault with intent to commit rape. Other statutes fix a maximum term of imprisonment which may be imposed upon conviction for each enumerated crime.

The conviction of an enumerated crime is not, by itself, a sufficient basis to commit the person so convicted under the sex offenders statute. Before the judge may sentence under the sex offenders statute, he must make a finding of fact that the person so convicted "constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill, . . . " (39-19-1). It is only when a finding is made that a person so convicted has these characteristics or defects that the statute gives the court authority to treat him differently from others convicted of the same crime and to confine him for life with the possibility of release only if "the interests of justice and the welfare of society may dictate. . . . " (39-19-7).

Whether a person falls within one of the classifications is essentially unrelated to the question of his conviction of the enumerated sex crime. Because of the drastic difference in sentencing between those who fall within the classification of Section 39-19-1 of the sex offenders statute and those who do not, it is essential that this critical fact be found but with the use of procedures which meet the tests of due process of law. It is the absence of such procedural safeguards that makes the Colorado Sex Offenders Sentencing Act invalid for failure to provide the due process of law required by the fourteenth amendment to the United States Constitution. This statute allows the finding to be made:

(a) Without a hearing at which the person so convicted may confront and cross examine adverse witnesses and present evidence of his own by use of compulsory process, if necessary.

(b) On the basis of hearsay evidence which the person is not entitled to see.

The Colorado Supreme Court appears to have relied upon this Court's decision in *Minnesota ex rel. Pearson* v. *Probate Court* in its decision about the constitutionality of the statute. *Pearson* does not sustain a statute such as Colorado's which has none of the procedural safeguards recited with approval by this Court in that decision.

The failure to provide procedural safeguards is defended by the State by characterizing the procedure by which determination is made as a sentencing procedure and relying upon *Williams* v. *New York* as justifying the absence of due process. This is a misplaced reliance. As written and as interpreted by the Colorado Supreme Court it is clear that the statute requires that the trial judge judicially find facts as a prerequisite to committing a person under the sex offenders statute. This is a distinctly different judicial function from the exercise of discretion considered in *Williams* v. *New York*. Furthermore, the practical considerations discussed in *Williams* are insignificant here.

I. A Person Sentenced Under the Sex Offenders Statute Is Deprived of His Liberty to a Much Greater Degree Than a Person Sentenced for the Same Crime Under the Criminal Statute. The Decision Whether the Facts Allow This Different Disposition Must Be Attended by Traditional Due Process Procedural Protection.

Central to the constitutional objection to the Colorado Sex Offenders Sentencing Act is the fact that those persons found to be within the classifications subject to sentencing under the statute are deprived of their liberty to a substantially greater degree than those not found to be within its classifications.

The inquiry whether a person is within the classifications commences only upon conviction of one of the enumerated crimes. In the case of a person convicted of the crime of indecent liberties, if the determination is that he is not within the classifications of the sex offenders statute, the maximum period for which he may lose his liberty (disregarding questions about the effect of the good time statute, COLO. REV. STAT. ANN., §§ 105-4-4 to -7 (1963)) is ten years. At the end of a sentence his right to freedom is absolute and requires nothing but noncriminal behavior on his part and the passage of time. The maximum duration for his involuntary confinement is exactly measurable and readily ascertainable from the moment sentence is passed.

Contrasted with this is the person convicted of the same crime who is found to fall within one of the classifications of the sex offenders statute. He receives the only sentence provided by the statute, an indeterminate sentence of from one day to life (39-19-1). For the remainder of his life his only chance to receive absolute freedom is if the Parole Board feels that the interest of justice and the welfare of society dictate such a release (39-19-7). He may also be paroled, but this is supervised freedom only and he is subject at any time to recommitment by the Parole Board (39-19-7).

The classifications in which a court must find a person convicted of an enumerated crime before he is subject to sentencing under the sex offenders statute are found in Section 39-19-1 of the Act. He must constitute a threat of bodily harm to members of the public, or be an habitual offender and mentally ill. The determination of whether a person so convicted falls within one of these classifica-

tions is made by the district judge. In doing so, he is judicially finding a fact, and is not exercising discretion. *Vanderhoof* v. *People*, 152 Colo. 147, 380 P.2d 902 (1963).

But in Colorado under the sex offenders statute this "finding of fact" is made after a completely summary proceeding. The procedure is invoked after conviction. The district court initially has discretion whether to commence the inquiry into whether a convicted person should be sentenced under the sex offenders statute. *Hawkins* v. *People*, 131 Colo. 281, 281 P.2d 156 (1955). Once the inquiry is initiated, the convicted person must be examined by psychiatrists who report in writing to the court (39-19-2). The court also receives a presentence investigation report prepared by the Probation Department (39-19-5(4)). With this data he must make a finding of fact as to whether the convicted person fits one of the classifications designated by the legislature. *Vanderhoof* v. *People*, 152 Colo. 147, 380 P.2d 903 (1963). Apparently *thereafter* he may have discretion to sentence under the sex offenders statute (39-19-5(1)). But see *United States* v. *Maroney*, 355 F.2d 302, 312 (3d Cir. 1966) (one day to life sentence is mandatory on finding that convict is a threat of bodily harm—dictum).

The critical determination turns entirely upon the finding of the judge based upon evidence untested by the hearing process. No hearing is reqtired prior to the determination. The accused's counsel is not guaranteed the right to call witnesses who might rebut the information reported by the examining psychiatrist or to rebut any other information before the court. There is no right to cross-examine the psychiatrist or others supplying facts to the court, nor any right to require witnesses to appear to explain their reports, nor even a requirement that the

reports be disclosed to the prisoner. There is no requirement of detailed or written findings to facilitate intelligent review. Yet on the basis of this procedure a man subject to a maximum sentence of ten years may be imprisoned for a maximum of life. Thereafter his fate is wholly within the power of the Parole Board (39-19-6 to -9).

On its face a procedure which results in such a sharp additional curtailment of a man's liberty must include a formal hearing, with notice of the charge, with the right to hear the evidence, with the opportunity to test the evidence by cross-examination and to rebut it with other evidence.

This Court has emphasized the degree to which the right to hear the evidence and test it by cross-examination is recognized as essential to a fair trial in *Pointer* v. *Texas*, 380 U.S. 400, 405 (1965):

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expression of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, we have expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law. . . .

This Court has likewise recognized that notice is essential in order that there be fair opportunity to meet the charge, *Oyler* v. *Boles*, 368 U.S. 448 (1962), *Chandler* v. *Fretag*, 348 U.S. 3 (1954), and has very recently stressed

the importance of requiring that a judge state his findings. *Kent* v. *United States*, 383 U.S. 541 (1966).

Even where proceedings are civil and not criminal the Court has said:

> [M]anifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute. . . All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. . . .

Interstate Commerce Comm'n v. *Louisville & N.R.R.*, 227 U.S. 88, 93 (1913).

II. Because of the Essentially Independent Nature of Finding That Convict Constitutes a Threat of Bodily Harm or Is an Habitual Offender and Mentally Ill, and Because of the Result of Such a Finding, the Sex Offenders Statute Defines a New Criminal Status and Full Procedural Protection Is Essential in Making the Finding That a Convict Is Within the Listed Classes.

The State of Colorado seeks to defend its failure to provide procedural protection for the process by which this critical determination is made by calling it a sentencing procedure and citing this Court's opinion in *Williams* v. *New York*, 337 U.S. 241 (1949). It is Petitioner's contention that this is essentially a separate criminal proceeding. It begins with a conviction, and, when an additional fact is found, ends in a drastically greater punish-

ment than that authorized for the conviction. This view was unanimously taken by a distinguished court of appeals, in *United States* v. *Maroney,* 355 F.2d 302 (3d Cir. 1966).

The question whether a person constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill is independent of the finding of guilt or innocence of an enumerated crime. The sex offenders statute does not make commission of an enumerated crime the basis for sentencing. It makes conviction a basis for commencing inquiry whether a person constitutes a threat of bodily harm to the public or is an habitual offender and mentally ill. It is clear from the statute as written and as construed that this is a fact finding proceeding, *Vanderhoof* v. *People,* 152 Colo. 147, 380 P.2d 903 (1963). It is equally clear that the fact which must be found is different from and additional to the fact that he was convicted of a crime. See *United States* v. *Maroney,* 355 F.2d 302 (3rd Cir. 1966).

In *United States* v. *Maroney,* 355 F.2d 302 (3d Cir. 1966), the Third Circuit considered the Pennsylvania Barr-Walker Act. Pa. Stat. Ann., tit. 19, §§ 1166-1174 (1958). In all material respects, that statute is identical with the original Colorado statute enacted in 1953. The same classification was required to be made in both Acts, the same procedures were followed in making it and the determination that a convicted person fell within the classification resulted in the same indeterminate sentence of from one day to life under the sex offenders statute, rather than under the statute under which he was convicted. The Third Circuit viewed the statute as basically a criminal statute. They said at page 309:

> The Act leaves no doubt, both in its language and its purpose, that it is a criminal statute and that what is imposed under its authority is criminal punishment. Its title and its text are replete with language which reveals that the proceeding is penal in nature. It may be invoked only after a precedent conviction of guilt of one of the specified crimes and prescribes a new and radically different punishment. A maximum sentence of life imprisonment is made mandatory and from it the defendant may only be released on the determination of the Pennsylvania Board of Parole that the 'interest of justice' so dictates. It is true that the Act provides for periodic psychiatric and psychological examinations which the Board of Parole is to review. But it is no less a criminal proceeding and no less the infliction of a criminal punishment because the Act provides for such studies, especially when this is accompanied by the drastic potential of life imprisonment if they do not affirmatively provide a basis for release. This criminal punishment does not lose its characteristic because the Act goes beyond simple retribution. . . .

The Third Circuit concluded that since the statute was penal in nature, the hearing to determine whether it was applicable to a particular person was essentially a criminal proceeding. The Court said, at page 312:

> It is a separate criminal proceeding which may be invoked after conviction of one of the specified crimes. Petitioner therefore was entitled to a full judicial hearing before the magnified sentence was imposed. At such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections.

> A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. He must be afforded all those safeguards which are fundamental rights and essential to a fair trial, including the right to confront and cross-examine the witnesses against him. . . .

In the State of Colorado's response to Specht's Petition for Writ of Certiorari, the State has taken a position with regard to the purpose of the sex offenders statute that is remarkably similar to the view of the Third Circuit. They say at page 3 of their response:

> At the same time, it is equally clear that the Colorado Statute imposes a type of punishment for a person *already convicted* of one of certain named offenses. Thus, the Colorado Statute does not, in and of itself, provide the basis for commitment. This is true because the basis for commitment—a finding of guilt—has already been determined prior to the time when the Colorado statutory proceedings are employed.

Although the Attorney General has misconstrued the Colorado statute when he says that the basis for commitment is the finding of guilt of one of the listed offenses, his statement of the purpose of the Act illuminates Colorado's view of the statute and indicates that the State so construes it in denying due process on the basis of *Williams* v. *New York.*

In addition to the statements by the Attorney General about the purpose of the statute, a review of the Colorado Sex Offenders Sentencing Act supports the conclusion that

it is essentially penal in nature. In the law as enacted in 1953, the purpose was said to be for the more efficient "punishment, treatment and rehabilitation of persons convicted [of the enumerated crimes] . . . " The second section still recites that "no person, convicted of a crime *punishable* in the discretion of the District Court under the provisions of this Article . . . . [shall be sentenced under the Act until psychiatric examination is conducted and report made thereon]" (39-19-2). (Emphasis added.) The Act refers to the commitment of persons under this statute as a sentencing of these persons which carries the implication that the statute is punitive. Finally, the Act makes clear that the penitentiary is an appropriate place of confinement under the Act (39-19-5, 39-19-6(2)).

The 1957 amendment modified the above-cited language in only one respect. The word "punishment" in Section 39-19-1 was changed to "control."

The Colorado Supreme Court also appears to regard the statute as a punishment statute. In *Trueblood* v. *Tinsley*, 148 Colo. 503, 509, 366 P.2d 655, 659 (1961), *cert. denied*, 370 U.S. 929 (1962), the court in considering whether the application of the sex offenders statute resulted in the denial of equal protection because of the differential in sentences which might be imposed, said:

> Generally, statutes which prescribe different *punishments* for the same violations committed under the same circumstances by persons in like situations are void as violative of equal protection of the laws. (Emphasis added.)

The Court then justified the statute on the ground that there was a reasonable classification to justify the different treatment.

It has already been pointed out that when the court finds a person within a classification of the Act, the sex offenders statute authorizes the imposition of a substantially greater punishment than the statute defining the offense for which the jury convicted that person. The judge's finding that the convicted person fits the classification of the sex offenders statute is therefore equivalent to a finding that he has committed a more serious crime than the crime for which he was convicted. The hearing which supports such a finding must be attended by the guarantees of due process consistent with such a drastic result.

A further constitutional question raised by the State's position that the statute is penal is the question whether the statute punishes the status of being mentally ill. Mental illness is an essential element which must exist for a person to fit one of the classes outlined in the statute. If one who fits the class incurs greater punishment, this may constitute cruel and unusual punishment. *Robinson* v. *California,* 370 U.S. 660 (1962). This issue was not raised in the Petition for Writ of Certiorari and will not be argued by Petitioner, but it is suggested here that such a question may exist in light of the State's interpretation of the Act.

III. If the Colorado Sex Offenders Statute Is Characterized as a Sexual Psychopath Statute, It Is Nevertheless Invalid for Failing to Provide Constitutionally Adequate Procedural Safeguards for the Process of Determining Whether the Statute Is Applicable to a Particular Individual.

The State has contended that the Colorado Sex Offenders Statute is punitive. This position raises serious constitutional questions which are dealt with in the previous portions of this brief. It must be noted, however, that the only significant authority the Colorado Supreme Court has cited to uphold the constitutionality of the sex offenders statute is the case of *Minnesota ex rel. Pearson* v. *Probate Court,* 309 U.S. 270 (1940). Thus, the Colorado Supreme Court appears to feel that the constitutional tests to be applied to the sex offenders statute are those referred to by this Court in the *Pearson* case.

The Minnesota sexual psychopath statute differs in many respects from the type of statute considered in this case and in *United States* v. *Maroney,* 355 F.2d 302 (3d Cir. 1966) (Pennsylvania). There are, moreover, wide variations in the statutes which have been classified as sexual psychopath statutes. See *Sexual Psychopath Statutes: Summary and Analysis,* 51 J. Crim. L., C. & P.S. 215 (1960). Petitioner adheres to his view that the Colorado statute, like the one construed in *Maroney,* provides for a separate criminal proceeding and therefore must also provide the procedural rights associated with criminal trials.

It is true that a comparison of the purposes and functions of the Colorado Sex Offenders Statute with the Minnesota type of statute indicates some similarities. Al-

though the Colorado statute is labeled a Sex Offenders Sentencing Act, not all persons convicted of the enumerated crimes are sentenced under the Act. See *Swanson* v. *People*, 155 Colo. 19, 392 P.2d 163 (1964). Conviction for an enumerated sex crime may establish a preliminary basis for further investigation to determine whether a convicted person should be committed for an indeterminate period. The investigation has as its goal a factual determination whether the person constitutes "a threat of bodily harm to members of the public, or is an habitual offender and mentally ill" (39-19-1). *Trueblood* v. *Tinsley*, 148 Colo. 503, 366 P.2d 655 (1961), *cert. denied*, 370 U.S. 929 (1962); *Sutton* v. *People*, 156 Colo. 201, 397 P.2d 746 (1964); *Ray* v. *People*, 415 P.2d 328 (Colo. 1966). Confinement and treatment, the dual purposes of the sexual psychopath statutes, Ploscowe, *Sex Offenses: The American Legal Context*, 25 LAW & CONTEMP. PROB. 217, 223 (1960), are likewise the dual purposes of the Colorado statute, which recites as its purposes "control, treatment and rehabilitation" (39-19-1). Like the sexual psychopath statutes, the Colorado statute provides for an indefinite term of confinement and indicates the desirability of medical diagnosis, treatment and periodic review of the condition of the person confined (39-19-1, 39-19-2, 39-19-4, 39-19-6). The critical classification in the Colorado statute—"a threat of bodily harm to members of the public, or is an habitual offender and mentally ill"—is vague and the statute does not define any of its terms. It is, however, probably about as precise as many of the definitions of sexual psychopaths, most of which have been criticized as unscientific and medically unmeaningful. See Hacker and Frym, *The Sexual Psychopath Act in Practice*, 43 CALIF. L. REV. 766 (1955); DiFuria

& Mees, *Dangerous to Be at Large*, 38 WASH. L. REV. 531 (1963); Kamman, *Evolution of Sexual Psychopath Laws*, 6 J. FOR. SCI. 170 (1961).

But even though there are similarities, the striking difference between the Minnesota statute and the Colorado statute is the total absence from the Colorado statute of the procedural safeguards emphasized by this Court in the *Pearson* opinion.

The provisions of the Minnesota statute which this Court pointed to in *Pearson* as guaranteeing procedural due process were: (1) The facts relied upon for sentencing must be submitted to the County Attorney, who thereupon files a petition in Probate Court signed by a person having knowledge of the facts; (2) the Probate Judge must set the matter down for hearing and for examination of the patient; (3) the patient may be represented by counsel and is entitled to compulsory process to compel the appearance of witnesses; (4) the court must appoint two physicians to examine the patient; (5) the patient has a right to appeal the finding that he has a psychopathic personality. 309 U.S. at 275-276 (1940).

The essential requirements of notice and hearing, which imply the right to confront and cross-examine witnesses, and of compulsory process to compel the appearance of witnesses, are absent from the Colorado statute. Their absence deprives persons subject to commitment under the sex offenders statute of due process of law.

It is sometimes held that a proceeding under a sex offenders statute is a civil rather than a criminal proceeding and that as a consequence the constitutional rights normally guaranteed an accused in a criminal proceeding are

not applicable. See e.g., *ex parte Keddy,* 105 Cal. App. 2d 215, 233 P.2d 159 (Dist. Ct. App. 1951), and Annot., 24 A.L.R.2d 350, 362 (1952). Cf. *People* v. *Frontczak,* 286 Mich. 51, 281 N.W. 534 (1938). But where the ultimate result is involuntary confinement of the person, whatever the legislature labels the statute due process should require a fair procedure for identification of persons whom the state subjects to its police power at the cost of their liberty. In *People* v. *Levy,* 151 Cal. App. 2d 460, 311 P.2d 897 (Dist. Ct. App. 1957), the court in assessing the California version of the Sex Offender Act said:

> Of course even though the Act is civil in nature, it does involve a deprivation of personal liberty, and is necessarily subject to constitutional safeguards. 311 P.2d at 900.

Similarly, in *Gross* v. *Superior Court,* 42 Cal.2d 816, 270 P.2d 1025 (1954), it was held that although such proceedings were civil and collateral to criminal proceedings, they resembled criminal cases in certain features and hence, the prisoner was entitled to bail, entitled to be present at a hearing, and was entitled to counsel.

This Court has recently emphasized that wherever judicial action is critically important in determining individual rights, labeling the proceedings civil will not eliminate the need for appropriate procedural protections. *Kent* v. *United States,* 383 U.S. 541, 86 Sup. Ct. 1045, 1054-1057 (1966).

In the *Pearson* case, the Court stated that it would presume that the state courts would safeguard the constitutional rights of persons subjected to deprivation of liberty

under a sexual psychopath statute. The reported decisions of the Colorado Supreme Court construing the sex offenders statute indicate that that court does not recognize the importance of the procedural safeguards listed in *Pearson*.

The first case to consider the constitutionality of the Colorado Sex Offenders Sentencing Act was *Trueblood* v. *Tinsley*, 148 Colo. 503, 366 P.2d 655 (1961), cert. denied 370 U.S. 929 (1962). Although the only constitutional attack made in *Trueblood* was that the application of the sex offenders act denied the prisoner equal protection of the laws, *Trueblood* has consistently been cited by the court as an answer to all constitutional objections. See *Specht* v. *People*, 156 Colo. 12, 396 P.2d 838 (1964); *Specht* v. *Tinsley*, 153 Colo. 235, 385 P.2d 423 (1963).

In *Trueblood*, the Colorado Supreme Court brushed aside the prisoner's attack on the sex offender statute on the single premise that similar statutes have been upheld in other jurisdictions. The court cited an inapposite Idaho case, *State* v. *Evans*, 73 Ida. 50, 245 P.2d 788 (1952), and the leading case of *Minnesota ex rel. Pearson* v. *Probate Court*, 309 U.S. 270 (1940). The total absence of the procedural safeguards commented on in *Pearson* was not mentioned by the court, and in *Specht* v. *Tinsley*, 153 Colo. 235, 385 P.2d 423 (1963), they summarily rejected petitioner's suggestion that they had misconstrued these cases.

In summary, Petitioner contends that if the Colorado statute is characterized as a sexual psychopath statute, it must fall because it lacks the very procedural safeguards listed by this Court in *Minnesota ex rel. Pearson* v. *Probate Court*, 309 U.S. 270 (1940).

IV. Proceedings Under the Sex Offenders Act Differ So Fundamentally From Ordinary Sentencing Proceedings That Due Process Should Require Procedural Protections Not Ordinarily Accorded a Convicted Person at Sentencing.

The Tenth Circuit held that the decision of this Court in *Williams* v. *New York*, 337 U.S. 241 (1949) was applicable to the Colorado statute here under attack and that due process does not require that procedural rights be made available to a defendant in a sentencing proceeding (R. 50, 51). This proposition is now being argued before this Court by the State (Response of Respondents to the Petition for Writ of Certiorari, 3-4). The petitioner contends that the decision of this Court in *Williams* is not applicable to this case.

In *Williams* the question before the Court related to the rules of evidence applicable to the manner in which a judge may obtain information to guide him in exercising his discretion in imposing sentence. The judge there had an admitted discretion within the limits fixed by statute. The fact of conviction of the crime was the only element necessary to allow the judge to exercise this discretion. As the Court pointed out at 337 U.S. 241, 252 it was conceded that the judge could have exercised his discretion on the basis of any information which he deemed appropriate without describing the source. The Court declined to apply due process procedural concepts to the process by which a judge gathered the information upon which to base his discretionary decision.

Petitioner Specht submits that he was not "sentenced" in the sense that Williams was sentenced by the New York

courts. In *Williams*, the trial judge had the choice of life imprisonment or the death penalty under the New York murder statute. Specht was formally charged, tried and convicted of an offense under the Colorado criminal statute defining the crime of indecent liberties. That statute provides for punishment, for an adult offender, by confinement in the penitentiary for a term of not more than ten years. At a sentencing proceeding strictly parallel with the one in *Williams* the Colorado trial judge could have sentenced Petitioner to a term of one year, or two years, or any number of years up to and including ten. Under such circumstances the rule announced in the *Williams* decision would have been applicable to Petitioner. But the nature of Petitioner's sentencing was entirely different and involved a question not present in *Williams*. He was sentenced without a hearing under another statute for a term with a maximum of more than ten years.

Although the judge under the Colorado statute has discretion whether to initiate the inquiry about the applicability of the Sex Offenders Statute, he must make a finding of fact before he can apply the sentencing procedures of the statute. The Colorado Supreme Court clearly pointed this out in *Vanderhoof* v. *People*, 153 Colo. 147, 380 P.2d 903 (1963). At page 149, the court said:

> • • • plaintiff in error contends that the classification is 'unreasonable, arbitrary and capricious because the classification is determined by the *discretion* of the district court acting solely in its own opinion.' With this contention we cannot agree. The classification is not determined by the trial court. The classification is set out in the act, *and the trial court merely makes a*

> *finding of fact* to determine whether or not defendant comes within the classification. (Emphasis added.)

The fact which must be found is that the prisoner is either (1) a threat of bodily harm to members of the public or (2) that he is an habitual offender and mentally ill (39-19-1). This fact is different and additional to the facts which were the basis of conviction of the enumerated crime. See *United States* v. *Maroney*, 355 F.2d 302, 311-12 (3d Cir. 1966), where the court characterizes similar proceedings under the Pennsylvania Barr-Walker Act as "entirely unlike a sentencing procedure," and holds that due process requires the guarantee of all procedural rights "which are customarily associated with criminal trials."

No such fact finding procedure was essential to the power of the trial court in the *Williams* case to impose a more severe sentence. The *Williams* decision is therefore inapplicable to the question of whether the Colorado Sex Offenders Statute is unconstitutional for failure to provide adequate procedural safeguards for such a fact finding process.

The decision in *Williams* was rested in part on historical grounds, the Court noting, at 337 U.S. 246, that sentencing judges have long exercised great discretion in using information obtained out of court in sentencing. The Court has, however, long recognized that due process is not a static concept frozen in historical practice, but rather, is a flexible one capable of application to newly discovered situations as they arise. *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961).

In *Williams*, the Court also pointed out that it might frustrate information-gathering procedures for pre-

sentence reports if the persons giving information had to give it in open court. In the case of the sex offenders statute, the most important data comes from a psychiatrist's report. The psychiatric report has always been a required piece of information to be considered by the court. It is doubtful that a requirement that the psychiatrist appear and testify would frustrate his free inquiry and exercise of his professional judgment.

Additional information comes from a presentence report prepared by the probation department (39-19-5(4)). However, this Court has indicated in *Kent* v. *United States*, 383 U.S. 541 (1966), that counsel for a juvenile was entitled to access to the social records and probation reports considered by the court in deciding whether the juvenile should be subject to juvenile jurisdiction or to adult criminal procedures. Certainly counsel would rebut or impeach inaccurate information therein. Even though this would presumably disrupt information gathering procedures and delay judicial proceedings, nevertheless this Court required such access because of the critical nature of the decision based on that information. The consequence of sentencing under the Sex Offenders Statute is substantially greater than the consequence of sentencing under the violated criminal statute; the protections afforded the Petitioner in the judge's critically important determination of fact should also be substantially greater than at ordinary sentencing.

In *Williams* the Court was careful to say that its decision did not mean that sentencing procedures are immune from scrutiny under the due process clause. 337 U.S. at 252, n. 18 (1949) (citing *Townsend* v. *Burke*, 334 U.S. 736 (1948)). In *Townsend*, the Court condemned sentencing in

reliance on prejudicial misinformation where the prisoner had no counsel to assist him in correcting the misinformation. If due process requires the presence of counsel, to what end does it do so?

> Analysis would indicate that counsel is required at sentencing to assure "fair play," that "fair play" means some sort of hearing, and that a hearing is little more than sham unless it embraces the right to know and thus be able to challenge adverse information.

Note, 101 *U. Pa. L. Rev.* 257, 270 (1952). See *Keenan* v. *Burke,* 342 U.S. 881 (1951) (per curiam); *In re Oliver,* 333 U.S. 257 (1948); cf., *United States ex rel. Almeida* v. *Baldi,* 195 F.2d 815 (3d Cir. 1952), cert. denied 345 U.S. 904 (1953) (due process held denied where evidence material to imposition of penalty was suppressed); Note 58 *Colum. L. Rev.* 702 (1958).

Even in an ordinary sentencing proceeding it may be an essential element of fairness to disclose to defendant the facts on which the judge will rely in sentencing so that the defendant can correct any errors in those facts. See Amendments to Fed. R. Crim. P., 86 Sup. Ct. 236, 238 (1966) (Douglas, J., dissenting).

Even if the sex offender proceeding is regarded as a kind of sentencing proceeding, it is not an ordinary one. If disclosure is important to fair procedure in an ordinary sentencing when the judge is exercising discretion, it would seem to be critically important in the unique proceedings provided for by the Sex Offenders Statute.

Conclusion

For the reasons above stated the Colorado Sex Offenders Sentencing Act should be declared to be unconstitutional on its face; the decision of the Court of Appeals should be reversed; and the case should be remanded with instructions to issue a Writ of Habeas Corpus to secure the discharge of Petitioner from the custody of the Respondent.

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APPENDIX A

Colorado Sex Offenders Sentencing Act

39-19-1. Indeterminate sentences to institutions—For the better administration of justice and the more efficient control, treatment and rehabilitation of persons convicted of the crimes of indecent liberties, incest, assault with intent to commit unnatural carnal copulation, assault with intent to commit rape, if the district court is of the opinion that any such person, if at large, constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill, the district court in lieu of the sentence now provided by law, for each such crime, may sentence such person to a state institution for an indeterminate term having a minimum of one day and a maximum of his natural life.

39-19-2. Requirements before sentencing—No person, convicted of a crime punishable in the discretion of the district court, under the provisions of this article, with imprisonment in a state institution for an indeterminate term having a minimum of one day and a maximum of his natural life, shall be so sentenced until:

(1) A complete psychiatric examination shall have been made of him by the psychiatrists of the Colorado Psychopathic Hospital or by psychiatrists designated by the district court and

(2) A complete written report thereof submitted to the district court. Such report shall contain all facts and findings, together with recommendations as to whether or not the person is treatable under the provisions of this article; Whether or not the person should be committed to the Colorado State Hospital or to the State Home and Training Schools as mentally ill or mentally deficient. Such report shall also contain the psychiatrist's opinion as to whether

or not the person could be adequately supervised on probation.

39-19-3. Sentence postponed—temporary confinement—To enable the district court to procure such a psychiatric examination and to afford time in which to make the same, the district court is hereby authorized and empowered to postpone sentence upon any person convicted of any one or more of the crimes enumerated in section 39-19-1, and to order the person so convicted to temporary confinement in the prison or jail in which such person was confined prior to his trial or would have been confined if not free on bail. Such period of temporary confinement shall not exceed a period of thirty days unless the district court, on the request of the psychiatric examiner, extends the observation period for an additional time not exceeding fifteen (15) days. It shall be the duty of the psychiatrists to examine the prisoner and report to the district court thereon within the period allowed by the district court.

39-19-4. Order—examination—place—Whenever the judge of a district court shall find that a psychiatric examination of a person convicted of any one or more of the crimes enumerated in section 39-19-1 is desirable, he shall appoint and designate the psychiatrist or psychiatrists to make such examination. The psychiatrists shall thereupon make such a psychiatric examination of the person so convicted either at a clinic, state hospital, or other institution so designated by the district court or at the place where such person is in temporary confinement, or it may request that he be brought to any clinic established by the State of Colorado for such purposes, or state hospital, or state, county, or private institutions.

39-19-5. Sentence—cost—place of confinement—(1) Whenever a district court, after psychiatric examination of and report on a person convicted of any one or more of the

crimes enumerated in section 39-19-1, shall be of the opinion that it would be to the best interests of justice to sentence such person under provisions of this article, he shall cause such person to be arraigned before him and sentenced to the Colorado State Penitentiary until such time as the State Board of Parole shall review the case or transfer to the appropriate institution as provided in section 39-19-6 of this article.

(2) The costs of maintenance of any person so convicted while in temporary confinement, and costs of transportation, including transportation to the Colorado State Penitentiary after sentence, and the costs of such an examination made by a psychiatrist designated by the district court, shall be borne by the county in which the crime has been committed.

(3) The district court is hereby authorized to grant probation to such person who has not been a previous sex offender, and to terminate such probation when maximum benefits have been obtained from supervision, and the authority to revoke probation and sentence as provided in this act if the person violates the terms of his probation.

(4) The provisions of 39-16-2 relating to the presentence investigation by the district court probation officer shall be applicable to all persons to be sentenced under the provisions of this article.

39-19-6. Periodic review by board of parole—(1) Within six months after a person shall have been sentenced under the provisions of this article for an indeterminate term having a minimum of one day and a maximum of his natural life, and at least every year thereafter, the Colorado State Board of Parole shall cause to be brought before it, with respect to each such person, all reports, records, and information concerning such person, for the purpose of determining whether such person shall be paroled, and it shall be the duty of the Board thereupon to make a ruling

with respect to each such person, who shall be notified in writing of such ruling.

(2) The State Board of Parole is hereby empowered and it shall be its duty to order the transfer of persons sentenced under the provisions of this article from the Colorado State Penitentiary to the State Hospital, the Reformatories, Industrial School, or any other appropriate State institution or facility, which the Board determines will best effectuate the purposes of this article and the Board shall have the further power to re-transfer such persons when necessary to provide treatment or proper custody, or to obtain current medical and psychiatric evaluation.

39-19-7. Parole board given control—when—The Colorado State Board of Parole is hereby granted exclusive control over the parole and reparole of persons sentenced under the provisions of this article, whether imprisoned in a penitentiary, or other state institution. The Board is hereby authorized and empowered to parole and reparole, and commit and recommit for violation of parole, any person sentenced under the provisions of this article. The Board shall have the further power to issue an absolute release from confinement to any person sentenced under the provisions of this article at such time and under such conditions as the interest of justice and the welfare of society may dictate. In considering the parole or reparole or an application for parole of any person sentenced under the provisions of this article, the Board shall give serious consideration to the original report and subsequent reports of the psychiatric examination of the person so sentenced and the recommendations contained in such reports.

39-19-8. General powers of board of parole—Except as otherwise provided in this article, the Colorado State Board of Parole shall have all the powers conferred and duties imposed upon it with respect to the parole of pris-

oners generally, in the parole and supervision of persons sentenced under the provisions of this article.

39-19-9. Application to persons now on parole—The provisions of this act are hereby extended to all persons who, at the effective date thereof, may be on parole, or eligible to be placed on parole under existing law, with the same force and effect as if this act had been in operation at the time they were placed on parole or became eligible to be placed thereon as the case may be.

39-19-10. State furnish services—It shall be the duty of the State of Colorado to furnish the psychiatric services provided for in this article and it shall be the duty of the institution where such persons are confined to furnish current reports, records, and recommendations, as may be required to assist the State Board of Parole in determining transfers, parole, or commitment of persons treated under the provisions of this article.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO. 831

FRANCIS EDDIE SPECHT, Petitioner

vs.

WAYNE K. PATTERSON, Warden, Colorado State Penitentiary; DR. CHARLES MEREDITH, Superintendent, Colorado State Hospital, Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATEMENT OF THE CASE

In accordance with the Revised Rules of the Supreme Court of the United States, Rule 40.3, the items specified therein are not restated. This is not to say, however, that the statement of question in the opening brief complies with Rule 40.1 (d) (2), nor comports with the question presented to and determined by the court below. To avoid the necessity of detailed analysis, we will therefore treat, for the purposes of our argument, the question that is presented to this court for determination as the same which was presented to and determined by the court below. We do suggest, however, that the question presented can more precisely be stated as:

Does due process command that a sentencing statute must explicitly provide the attributes of due process which attach to a criminal trial or civil commitment proceeding?

or

Does a legislative enactment which is responsive to the demands of an enlightened approach to sentencing offend due process?

Likewise, we do not agree with petitioner's assertion contained in the statement of the case that petitioner was not afforded a hearing or his claims as to what did or did not occur at that hearing. No official record of his sentencing hearing or hearings exists and no evidentiary hearing has been held by any court as to what did or did not occur at his hearing to impose sentence and, therefore, any questions in regard thereto are not properly before this Court. We, therefore, treat such statements as arguments and not as statement of fact and will respond thereto in our argument.

For the purpose of brevity, we will refer to the Colorado "Sentencing of Sex Offenders" Act as the Act. Unless otherwise noted, the statutory references are to Colorado Revised Statutes 1963.

SUMMARY OF THE ARGUMENT

The question presented by petitioner can be succinctly stated as: Does a legislative enactment which is responsive to the demands of an enlightened approach to sentencing offend due process? The Colorado Act for "Sentencing of Sex Offenders" rejects punishment and retribution and substitutes in its place control and dis-

cipline. It supplants rigidity with flexibility; it offers rehabilitation and treatment in lieu of the suspended deep freeze of custody alone; a sentence which offers parole and discharge in lieu of a fixed period of custody. It is a sentence which is operative only upon standards in distinction to one fixed by the vehicle of a plenary, discretionary authority; a determination which is subject to the scrutiny of review in contradistinction to the orthodox conclusive sentence not subject to review.

Petitioner's basis of attack exhibits a fundamental misunderstanding of the "Sentencing of Sex Offenders" Act. The Act does not cause one's loss of liberty, but the conviction of a crime, in this case the crime of indecent liberties. The fact that the statutory section defining the crime of indecent liberties permits the imposition of a sentence and the subject Act permits the imposition of an alternative sentence is of no legal consequence. The two statutory provisions operate in pari materia as one statutory provision permitting imposition of either one or the other of alternative sentences, an operative effect which is substantially similar to that of USC § 4208(b). To say petitioner was entitled to due process begs the question. Pellucidly, petitioner is and was entitled to due process at all stages of his proceeding, including sentencing. To state the obvious, however, does not establish the validity of petitioner's hypothesis. Due process required upon sentencing does not take the form postulated by petitioner. The form of due process required at a hearing to impose sentence is "fair play." Whether petitioner was afforded such due process is not before the court in this case. Petitioner presented before the court below solely a question of substantive due process. Petitioner opined that the Act is "invalid" because it fails to prescribe the quali-

ties and attributes of due process demanded. The issue as to what was the nature of the hearing afforded petitioner has not been raised before, nor determined by, any court. We therefore, will limit our response to the only question properly before this Court — what attributes of due process must a statute providing for imposition of sentence explicitly guarantee to comport and be in harmony with due process.

ARGUMENT

I.

THE "SENTENCING OF SEX OFFENDERS" ACT PROVIDES FOR IMPOSITION OF A SENTENCE AND DOES NOT PROVIDE A CRIMINAL PROCEEDING TO CONVICT OR A CIVIL PROCEEDING TO COMMIT. CLEARLY, AT A HEARING TO IMPOSE SENTENCE, PETITIONER IS ENTITLED TO DUE PROCESS. HOWEVER, THE NATURE AND QUALITY OF RIGHTS WHICH PETITIONER ARGUES THAT AN ACT MUST EXPLICITLY GUARANTEE DO NOT APPLY TO SENTENCING. SINCE THE ACT DOES NOT PROVIDE A TRIAL, THE PANOPLY OF TRIAL DUE PROCESS RIGHTS DO NOT ATTACH. IT IS NOT REQUIRED THAT A SENTENCING STATUTE EXPLICITLY GUARANTEE RIGHTS WHICH DO NOT ATTACH. MEASURED BY THE APPLICABLE DUE PROCESS STANDARD, THE ACT IS CLEARLY A VALID SENTENCING STATUTE.

As a proper basis for our argument in response to petitioner's, it is apropriate to summarize the essential

statutory scheme of the "Sentencing of Sex Offenders" Act and the appropriate decisions construing same. The form of the statute in effect at the date of petitioner's sentencing was as is now expressed in Colorado Revised Statutes 1963, vol. 3, pp. 326 to 329, with one exception not relevant to the issues of this case.[1]

The declaration of purpose is:

> "For the better administration of justice and the more efficient control, treatment, and rehabilitation of persons convicted of the crimes of * * *."
> 39-19-1.

The sentencing provision may apply if:

> "... the district court is of the opinion that any such person, if at large, constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill, * * *."

Prior to imposition, the court must cause a complete psychological examination of the defendant, receive a report thereof and cause a pre-sentence report to be prepared and filed with the court. 39-19-2; 39-19-5(4). When these conditions have been met, the defendant is brought before the court for arraignment or hearing for imposition of sentence. 39-15-5. In lieu of the alternative sentencing provision, the court in its discretion may grant probation or may impose the sentence provided by the Act, which is a minimum of one day and a maximum of life. 39-19-5(3); 39-19-2(1). The place of initial commitment is the state penitentiary. 39-19-5(1). Upon commitment, the defendant's case must be reviewed by the Parole Board within

[1] In 1963, CRS '53, 39-19-1, was amended to include unnatural carnal copulation and rape. Colo. Session Laws, 1963, Ch. 96, § 1.

six months and at least once a year thereafter. 39-19-6(2). The Parole Board is charged with the duty of determining the proper place of custody "to provide treatment or proper custody" and in furtherance of such duty may transfer or re-transfer a person to an appropriate institution. 39-19-2(2). The Board is further invested with the authority to parole, terminate parole, re-parole, and

> ". . . to issue an absolute release from confinement to any person sentenced under the provisions of this article at such time and under such conditions as the interest of justice and the welfare of society may dictate. . . ." 39-19-7.

The Act provides a sentence and hearing for imposition of sentence. It does not provide a basis for commitment or loss of liberty. Nor is this statute a so-called "sexual psychopath" statute. The commitment or loss of liberty is founded upon conviction of a crime. The statutory section which defines the corpus delicti of the crime with which a defendant is charged and the Act are construed in pari materia "and must be interpreted together." *Sutton v. People*, 156 Colo. 201, 397 P. 2d 746, 747 (1964). The sentencing provision of 40-2-32 and the Act are not separate and distinct, but operate together as one. It is an operative, legal effect which permits the sentencing court to impose one or the other sentence in its discretion.[2] In effect, the sentencing court, upon hearing to impose sentence, has three alternatives. They are (1) to grant probation; (2) to impose a sentence within the limits specified by 40-2-32; or (3) impose a sentence pursuant to the Act.

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[2]An operative effect which is substantially similar to that provided by 18 USC 4208(b).

The Act was in effect at the time petitioner committed the act which gave rise to the charge. Upon conviction, defendant was not subject to the sentence provided by CRS 1963, 40-2-32, but was subject to one or the other, the same as if the alternative sentence was provided in 40-2-32. " 'But, upon conviction, he is subject to whatever loss of liberty the legislature has prescribed for his crime. . . .' " *Specht v. Patterson*, 10th Cir., 357 F.2d 325, 326 (1966). A hearing under the terms of the Act, therefore, obviously is not one to convict, but one to impose sentence — a sentence which is imposed in the discretion of the trial court.[2] It is a discretionary decision, which is based upon and measured against the standards and classifications provided and is a determination subject to scrutiny upon review. See *Ray v. People*, ... Colo. ...., 415 P.2d 328 (1966), and *Hawkins v. People*, 131 Colo. 281, 281 P.2d 156 (1955).

It goes without saying that a hearing to impose sentence must be conducted in accordance with the commands of due process. But what are the attributes of due process which attach to a hearing on imposition of sentence? Very obviously, it is not the panoply of rights which attach to a criminal trial to determine guilt or a civil trial which results in one's commitment.

This Court has clearly enunciated the nature and quality of due process which attaches to a hearing to impose sentence. Foundational to a discussion of this point is the statement of this Court in *Townsend v. Burke*, 334 U.S. 736, 92 L.ed. 1960, 68 Sup. Ct. 1252 (1948):

". . . It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the

[2]See Appendix A.

careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process.

Nor do we mean that mere error in resolving a question of fact on a plea of guilty by an uncounseled defendant in a non-capital case would necessarily indicate a want of due process of law. Fair prosecutors and conscientious judges sometimes are misinformed or draw inferences from conflicting evidence with which we would not agree. But even an erroneous judgment, *based on a scrupulous and diligent search for truth,* may be due process of law.

In this case, counsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading or court records, *a requirement of fair play* which absence of counsel withheld from this prisoner." 334 U.S. 741. (Emphasis supplied.)

Dispositive of the question presented are the following statements of this Court in *Williams v. New York,* 337 U.S. 241, 93 L.ed. 1337, 69 Sup. Ct. 1079 (1949):

". . . Here, for example, the judge's discretion was to sentence to life imprisonment or death. To aid a judge in exercising this discretion intelligently the New York procedural policy encourages him to consider information about the convicted person's past life, health, habits, conduct, and mental and moral propensities. *The sentencing judge may consider such information even though obtained outside the courtroom*

from persons whom a defendant has not been permitted to confront or cross-examine. It is the consideration of information obtained by a sentencing judge in this manner that is the basis for appellant's broad constitutional challenge to the New York statutory policy. 337 U.S. 245.

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". . . A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has ben determined. Highly relevant — if not essential — to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. *And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.*

"Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime . . . . *The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offense.* . . . 337 U.S. 247.

". . . We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation report draws on information

concerning every aspect of a defendant's life. The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues. 337 U.S. 250.

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". . . The due-process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due-process clause would hinder if not preclude all courts-state and federal-from making progressive efforts to improve the administration of criminal justice. 337 U.S. 251.

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". . . We hold that appellant was not denied due process of law." 337 U.S. 252. (Emphasis supplied.)

Also apropos is the following statement from *William v. Oklahoma*, 358 U.S. 576, 3 L.ed. 2d 516, 79 Sup. Ct. 421 (1959):

". . . But we go on to consider this Court's opinion in Williams v. New York, 337 US 241, 93 L.ed. 1337, 69 S Ct 1079. *This Court there dealt with very similar contentions and held that, once the guilt of the accused has been properly established, the sentencing judge, in determining the kind and extent of punishment to be imposed, is not restricted to evidence derived from the examination and cross-examination of witnesses in open court but may, consistently with Due Process Clause of the Fourteenth Amendment, consider responsible unsworn or 'out-of-court' information relative to the circumstances of the crime and*

to the convicted person's life and characteristics." 358 U.S. 584. (Emphasis supplied.)

It is clear, therefore, that at a hearing to impose sentence the trial court may consider hearsay evidence provided that the informational process is designed to elicit the truth. It has not been required that a defendant be *guaranteed* the opportunity to confront the sources of information and compulsory process to compel attendance of witnesses on his behalf. Since the attributes of trial due process, which petitioner demands, are not required, obviously a sentencing statute which does not provide that which is not required does not run afoul with due process.

What may or may not be required under the multitudinous situations which may arise in sentencing to fulfill "fair play" is not a justiciable issue in this case. Repetitiously, what occurred at petitioner's hearing is not before this Court. Due process may require that defendant be given a copy of the psychiatrist's report and the presentence report.[4] It can be said that, unless such is done, no adequate opportunity to test the veracity of the informational process is afforded. Under the possible variables which may arise, a request for a hearing and the right to compulsory process may be appropriately addressed to the trial court; that is, when necessity arises to test the verity of the informational process, correct or add to same. However, any such discussion or delineation in this case is academic.

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[4]But see Fed. Rules Cr. Pro., Rule 32, as amended February 28, 1966, which provides that disclosure is only permissive. . See also 18 USCA, Rule 32 (Supp.); notes of advisory committee on rules for citation of comments, both pro and con. Also pertinent is the following comment: "The Commission recommends: In the absence of compelling reasons for nondisclosure of special information, the defendant and his counsel should be permitted to examine the entire presentence report." THE CHALLENGE OF CRIME IN A FREE SOCIETY — A Report by the President's Commission on Law Enforcement and Administration of Justice, p. 145.

We are concerned, in this case, only with a statute which permits imposition of an alternative sentence. Must it provide explicitly, by words and phrases, that any information utilized to determine sentence be proven by the rules of evidence applicable to a trial and that the defendant has the right to compel the attendance of witnesses, etc.; and if it does not, due process requires it to be held "invalid"? Such a fixed, static concept of due process does not apply to a hearing for imposition of sentence. This Court's decisions in *Townsend, Williams v. N.Y.*, and *Williams v. Oklahoma* dispose of this contention adversely to petitioner.

The Act is not one which thwarts due process, but fulfills due process. How can due process be offended by a sentence which is responsive to an enlightened approach to sentencing? It substitutes control and discipline for punishment and retribution. "Certainly, control of the person must be assured before treatment and rehabilitation is undertaken." *Trueblood v. Tinsley*, 148 Colo. 503, 366 P. 2d 655, 658 (1961). It supplants rigidity with flexibility; it makes available, through the vehicle of Parole Board transfer, the full range of state facilities; and parole and discharge are available at the time rehabilitation is effected. It is a sentence which offers treatment and rehabilitation in lieu of the deep freeze of a fixed period of custody. Further, its imposition is determined on the basis of standards as opposed to conclusive plenary discretion without standards.[5] Finally and equally significant, the imposition is subject to the scrutiny of appellate review in contradiction to the orthodox Colorado sentence which is imposed within the plenary and conclusive dis-

[5]See Appendix "B".

cretionary authority of the trial court.[6] The fact, therefore, that it responds to the enlightened approach to sentencing does not transform it into a different type of proceeding than it is. It still remains what it in fact is — a statute which permits imposition of a sentence.[7]

> ". . . In general, these modern changes have not resulted in making the lot of offenders harder. On the contrary a strong motivating force for the changes has been the belief that by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship. This belief to a large extent has been justified." *Williams v. New York,* supra, 337 U.S. 249.

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[6]See as an example **Raullerson v. People,** — Colo. —, 404 P. 2d 149, 158 (1965).

[7]It is also a sentence which accomplishes an end not fulfilled in the sentencing system of every jurisdiction. In that regard, the following comment is pertinent:

'Our federal machinery is not adequate to achieve the second objective of the Model Sentencing Bill — that is the identification of the dangerous offender and his incarceration for a long enough period to provide treatment and rehabilitation." 41 F.R.D. 249, 253.

It is, therefore, a type of sentence which accomplishes both desired ends — control, if required, and the opportunity of early freedom upon rehabilitation.

II.

THE PRINCIPAL POSITION OF PETITIONER IS THAT, UNLESS THE PANOPLY OF RIGHTS WHICH ATTACH TO A CIVIL COMMITMENT PROCEEDING ARE EXPLICITLY PROVIDED BY THE SENTENCING OF SEX OFFENDERS ACT, IT OFFENDS DUE PROCESS AND THEREFORE IS INVALID. THE STATEMENT OF THIS PROPOSITION CLEARLY ILLUSTRATES PETITIONER'S MISUNDERSTANDING OF THE ACT. IT DOES NOT PROVIDE A PROCEEDING TO COMMIT — IT ONLY AND SIMPLY PROVIDES FOR IMPOSITION OF A SENTENCE.

We have established what we consider to be the pivotal issue and its proper disposition — an issue and determination which obviously do not comport with petitioner's view. However, an analysis of his position and the bases therefor support our view. Petitioner's four arguments constitute two essential approaches, (1) substantive due process, and (2) procedural process. The procedural process attack is divided into two prongs, (1) a view that procedural due process requires a separate trial, to which the panolpy of due process attaches; and (2) even if a summary type of sentencing hearing is all that was required, "fair play" was not afforded to petitioner.

As we have discussed, neither of the procedural due process questions is properly before this court. The only question presented, argued and determined by the courts below is a question of substantive due process. No evidentiary hearing has been held before either a federal or state court to determine the nature of the hearing to im-

pose sentence, what rights were afforded, and if any rights which may be required were denied. We will, therefore, limit our response to petitioner's argument to the only question properly before the court, that is, one of substantive due process. Stated in another way, what rights must be explicitly guaranteed by a statutory provision providing for imposition of sentence to comport with the requirements of due process?

The petitioner's principal thesis is that the act is so unlike a sentencing procedure that it must be considered a separate criminal proceeding. Being a separate criminal proceeding, certain of the rights guaranteed by due process at a trial to determine one's guilt must attach. It is difficult to determine what is the nature of the hearing which petitioner asserts due process demands, and precisely what rights petitioner asserts attach.[8] For the sake of simplicity, we will address our argument solely to the question of whether the quality of due process which attaches to a hearing ot impose sentence is the measure of due process which attaches to a hearing to impose sentence under the Act, or whether due process requires the Act to explicitly provide additional guarantees.

Reducing petitioner's four arguments to essentials, it appears to us that there are two principal premises upon which petitioner supports his proposition that a hearing to impose sentence under the Act must be considered as a separate criminal proceeding. The first is that a potentially more stringent sentence may be imposed, and the second is that the imposition thereof is based upon a finding

[8]The nature of the rights which petitioner contends attach are described in various ways throughout his brief. One description would indicate one permissible type of hearing while another indicates a different permissible type. We will, therefore, not pursue this entanglement.

of fact by the trial court. Several subsidiary and corollary principles are expressed to buttress these two principal premises. They are (1) that a hearing held pursuant to the act is for the purpose of imposing sentence; (2) that the sentence imposed is potentially more severe or stringent than that which otherwise may be imposed; (3) that the determination made by the trial court to impose a sentence pursuant to the Act is a determination critical to the defendant; (4) that the Act permitting imposition of the sentence in accordance therewith is essentially punishment or in effect punitive; (5) that the determination of the trial court to impose sentence pursuant to the Act is distinct and separate from the determination of guilt; (6) that the determination to impose sentence is a finding of fact and not a discretionary decision; (7) that petitioner was entitled to a hearing under the Act which afforded him due process; (8) that the measure of the quality and nature of due process which is required is the panoply of rights which attach to a criminal trial or a civil commitment proceeding; (9) that the Act is invalid unless it explicitly by its terms guarantees the nature of due process which attaches to a civil commitment proceeding. As to most of the corollary theories, we are in substantial agreement.

It appears unnecessary to state the obvious, that the Act provides for the imposition of a sentence. It appears to us accepted by all that a sentence is to a lesser or greater degree punishment or punitive in nature.* To continue the reinstatement of the obvious, the alternative sentence provided by the Act, as to this petitioner, can be

*As we previously discussed, a sentence imposed pursuant to the Act is not essentially punishment. It is control, treatment and rehabilitation. We only make this statement in the sense that any loss of liberty, even a civil commitment, can be considered to some extent punitive in nature.

considered a greater loss of liberty than the alternative sentence provided by 40-2-32.[10] Imposition of sentence, so far as we are advised, is in every case a separate and distinct determination from the determination of guilt. It is likewise a determination in each case which is critical to the defendant. Pellucidly, a hearing to impose sentence must afford one with due process. Further, it requires only cursory review of the statute to determine that the Act does not explicitly require the panoply of due process attributes which attach to a civil commitment proceeding or criminal trial.

Therefore, the only essential area of dispute is whether the panoply or rights which attach to a civil commitment proceeding attach to a hearing to impose sentence and must be explicitly provided by the Act or offend due process. This is the area of dispute which crystallizes the question presented.

The petitioner's conclusion that a hearing to impose sentence pursuant to the Act must be considered a criminal proceeding separate and distinct from that which determined his guilt is, in our judgment, founded on fictitious and ephemeral bases. He discards the teachings of *Williams v. New York,* supra, on the sole premise that the New York trial court was not called upon to make a finding of fact and therefore the decision is inapposite. Apparently, then, it is petitioner's theory that, if Colorado eliminated the specification of classifications upon which a sentence may be imposed, *Williams* would be dispositive. It follows then that, if Colorado eliminated the specifica-

[10]It is not in every case a potentially longer period of custody. See 40-2-28 which provides upon conviction of first degree rape a sentence with a minimum of not less than three years and a maximum of up to life.

tion of standards and the imposition was within the plenary discretion of authority of the trial court, his argument would fall. However, since Colorado has included a specification of standards or classification, petitioner opines it is transformed into an entirely different proceeding than a hearing to impose sentence. The distinction is obviously one of form and not of substance. If petitioner's argument can be satisfied by the simple device of elimination of the standards, there can be no clearer illustration of the insubstantiality of petitioner's position. To this fictitious argument this Court's comment is apropos:

> "And it is conceded that no federal constitutional objection would have been possible if the judge here had sentenced appellant to death because appellant's trial manner impressed the judge that appellant was a bad risk for society, *or if the judge had sentenced him to death giving no reason at all.* We cannot say that the due-process clause renders a sentence void merely because a judge gets additional out-of-court information to assist him in the exercise of this awesome power of imposing the death sentence." *Williams v. New York,* supra, 337 U.S. 252. (Emphasis supplied).

Nor can it tenably be said that due process voids a sentence based upon a classification.

Critical to petitioner's argument is that the process by which a sentence pursuant to the Act is imposed is a "finding of fact." Petitioner belabors the development of the theory that the process by which sentence is imposed is a finding of fact and pours concrete from all directions to solidify and buttress this position — all for what purpose? Is it relevant to the determination of this case whether the process is characterized or labeled as a "find-

ing of fact," a "determination," or "in the discretion of the trial court"? It is irrelevant what label is attached to the thought process by which the court determines sentence. No matter what tag is attached, the nature of the decision remains the same — a determination as to what sentence is imposed.[11]

In Colorado, numerous "findings of fact" may be required in imposing sentence. Whether the place of incarceration is the state penitentiary or the state reformatory depends upon a determination of age.[12] Eligibility for probation depends upon a determination that one has not twice before been convicted of a felony.[13] All sentences require a determination that facts and circumstances exist which require a lesser or greater sentence. Apparently, petitioner is asserting that, if a sentence is imposed unrelated to facts and circumstances, any sentence, no matter whether it be death, life imprisonment, or one day, is permitted by due process. By this argument he contends for a capricious imposition of sentence. Of course, Colorado neither contends for nor supports such a sentencing process. Whether standards are specified by the legislature or not, we contend for and support only sentences which are founded upon an exercise of sound discretion — a sound discretion based upon a determination that facts exist which support the imposition of a greater or lesser sentence, whichever imposed.[14]

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[11]For further discussion see Note 3.

[12]See as example 40-5-1(3).

[13]39-16-3.

[14]Modern jurists have agreed on the need for broad discretion in the sentencing procedure. Common to the expression of such a need is that of the Honorable James Benton Parsons, United States District Judge, who addressed the Institute on Sentencing for United States District Judges, 35 F.R.D. 381, 423. Judge Parsons opines that wise sentences are founded upon a sound sentencing philosophy which is

Petitioner tangentially attacks the validity of the sentence in that (1) it can be considered punishment for mental illness; (2) the specification of standards in the Act may be vague; (3) it may be considered as increased punishment based upon past conduct; and (4) one may receive a greater sentence than another convicted of the same crime. He raises these points, even though admitting that they were not raised or considered by the court below or contained in the question presented in his petition for certiorari.

In response seriatim, commitment is not based upon mental illness, but conviction for commission of a criminal act. The classification is to a large extent empirical. There exists no scientific classification of the mental abnormality which results in the commission of sex crimes.[18] Thereby the classification of "an habitual offender and mentally ill" is required. What more rational and workable standard can be specified than one with an intellectual defect which has established a pattern resulting

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[16] (Continued)
exercised within a framework of broad judicial discretion employing the varied aids which are available to the sentencing court. According to Judge Parsons, such aids include an examination of the defendant by the court; the statements of counsel on both sides on the question of aggravation or mitigation and their recommendations for a proper sentence; the recommendation of the court's "investigative agent"; and the statements of the defendant himself. For a further discussion of the value and use of extra judicial information in the determination of a proper sentence see: 30 F.R.D. 483; 40 F.R.D. 433; and Note, 74 Yale L.J. 379.

[17] The sex offender is often found to be a psychopathic personality, i.e., one who fails to learn from experience. Because of the frequency of relapse in such cases, there is a need for prolonged control. Where recidivism may in part result from some mental abberation, there is a marked unlikelihood of the rehabilitation of the sexual psychopath within the framework of ordinary penology. Therefore, the orthodox system of sentence and parole does not satisfy the need created by this class of criminal offender. Nor can punishment alone be considered the penultimate in dealing with a case of this nature. Cf. The Legal Disposition of the Sexual Psychopath. 96 U.Penn. L. R. 672; and note, 37 Mich. L.R. 613.

in commission of sex crimes and obvious propensity of continuation thereof. What more rational standard for greater control and need for rehabilitation is "constitutes a threat of bodily harm to members of the public"?[16] Past conduct is not the basis of commitment, but a factor in determining an appropriate sentence. Such is a universally accepted factor in determining sentence.[17]

As to the last point: "The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender." *Williams v. New York*, supra, 337 U.S. 247.

By continued repetition, petitioner attempts to imbue credibility to the theory that, if an alternative sentence is provided by a separate statutory provision, it must be considered a separate criminal proceeding. What force commands that a provision providing a sentence must be contained in the same statutory provision which defines the corpus delicti of a crime? Apparently, petitioner contends that, if the alternative sentence were a part of 40-2-32, his argument would be completely satisfied and no question of due process would arise. In other words, petitioner's contention evaporates by the simple device of the state legislature amending 40-2-32 to provide an alternative sentence of a one-day minimum to a maximum of life.

Petitioner's attempt to confuse and obviscate the pivotal question presented is further compounded by the citation and reliance on decisions concerning statutory proceedings providing for civil commitment of sex psycho-

[16]See Appendix "B".

[17]See Williams v. Oklahoma, supra, and annot., 96 ALR 2d. 768, 780.

paths. As can be seen by review of the statutes of the respective states, basically three statutory schemes are expressed.[18]

Two statutory schemes are "sex psychopath" statutes providing for the civil commitment of sex psychopathics. One is of the type considered by this Court in *Minnesota ex rel Pearson v. Probate Court,* 309 U.S. 270, 84 L.ed. 744, 60 S. Ct. 523 (1940). The other is the California type procedure. The latter operates upon petition after conviction of a sex crime. If civil commitment is ordered, the sentence is suspended. When rehabilitation is effected, the defendant is remanded to the court for execution of his sentence. It is a procedure which on its face appears contradictory and self-defeating.[19] However, the choice is a question of choice of alternatives addressed to the legislature. "But the Due Process Clause of the Fourteenth Amendment does not, nor does anything in the Constitution, require a state to fix or impose any particular penalty for any crime it may define. * * *" *Williams v. Oklahoma,* supra, 358 U.S. 586. The third type is not a "sex psychopath" statute, but is a sentencing provision, i.e. Colorado, Pennsylvania and Oregon.[20] Conviction of a

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[18]See annot. 24 ALR 2d 350.

[19]In this regard, the statement of critics of the California law is pertinent:

> "The law attempts the contradictory and mutually exclusive elements of punishment and treatment. This absurdity culminates in the faulty timing of first attempting psychopathic cure and improvement, although under most unfavorable circumstances, and then proceeding with punishment. If the punishment has to be retained at all costs, it would seem to make more sense first to punish and then to proceed with the cure."
> 43 Calif. Law Rev. 766, 777

[20]Apparently the label of "sexual psychopath statute" has become a reference of art. There are two different methods presently employed in dealing with the sex oriented psychopathic criminal. While the majority of the states have followed a civil commitment method, Colorado, Pennsylvania and Oregon have adopted the sentencing pro-

crime of the type designated by the Act is the basis of commitment. The only question remaining is what sentence to impose.

Upon analysis, petitioner's contentions and bases therefor are bereft of substance. His attempt to create a separate proceeding when one doesn't exist is based upon form and not substance.

CONCLUSION

No more succinct, precise and poignant summation can be formulated in words and phrases than the conclusion of the court below:

> "We uphold the constitutionality of the act and agree with the reasoning of the Wisconsin court in State v. Haas, supra, that petitioner was 'afforded all the rights of due process at the time of the trial. He (was) afforded the right to be heard by himself and counsel, to be advised of the nature of the charge against him, to meet the witnesses face to face and compel the attendance of witnesses in his own behalf, and to a speedy trial by an impartial jury. But upon conviction, he is subject to whatever loss of liberty the legislature has prescribed for his crime * * *.'
>
> " 'There are sound practical reasons', says Mr. Justice Black, 'for different evidentiary rules governing trial and sentencing procedures * * *.' Williams v. People of State of New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337. In determining whether a con-

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[20] (Continued)
cedure attendant to the conviction of certain offenses to provide a method of enlightened treatment of sex offenders. It is notable that of the two types of statutes, only the former have come to be known as "sexual psychopathic statutes." See annot. 24 ALR 2d 350.

victed person shall receive an indeterminate sentence based upon a recognized classification or a ten year maximum sentence, the sentencing court is free to utilize investigational techniques unhampered by due process requirements. 'The due-process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due-process clause would hinder if not preclude all courts — state and federal — from making progressive efforts to improve the administration of criminal justice.' Williams v. People of State of New York, supra; * * *." *Specht v. Patterson*, 10 Cir., 357 F.2d 325 (1966), pp. 326 and 327.

The judgment of the Circuit Court must be affirmed.

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Appendix "A"

Note 3.

We are mindful that the Colorado Supreme Court characterized the process by which sentence is imposed as "a finding of fact" in *Vanderhoof v. People,* 152 Colo. 147, 380 P.2d 903 (1963). The nature of the process by which sentence is imposed was not addressed to the court in *Vanderhoof* and the aforementioned comment was obiter dictum.

If a label must be affixed to the thought process which results in imposition of sentence, the appropriate characterization is "in the discretion of the court." This is the language of the statute. See 39-19-2(1). In *Hawkins v. People,* 131 Colo. 281. 281 P.2d 156 (1955), the court stated:

> ". . . The statute further provides, in substance, that *if, in the discretion of the trial court,* it is of the opinion that an offender falls within the class above described, the said sentence of one day to life shall not be entered until a complete psychiatric examination shall have been made of said defendant. *The court has dicretion to order such examination, or to impose the penalty* as directed by the statute which defines the offense. The record in this case fails to disclose any abuse of this discretion and no error was committed in this connection." (Emphasis supplied.) 281 P.2d 158.

Further is the statement of the Court in *Trueblood v. Tinsley,* 148 Colo. 503, 366 P.2d 655 (1961):

> "The trial court should consider all material matter before it which will aid in the formation of a proper

> *'opinion'*. Without detailing the matters *considered*, we merely say that information supplied to the court from the probation report and other sources supported its disposition of the case." (Emphasis supplied.) 366 P.2d 657.

In *Trueblood v. Tinsley*, 10th Cir., 316 F.2d 783 (1963), the Circuit Court stated at page 785:

> "The act vests in the court, after the psychiatric examination has been made and the report thereof filed, *power to determine* whether sentence should be imposed under such act. Trueblood v. Tinsley, supra. *The court made that determination*, and we fail to find any substainable basis for the contention that imposition of the sentence violated any rights of petitioner under the Fourteenth Amendment." (Emphasis supplied.)

Also apropos is the court's statement in *Sutton v. People*, 156 Colo. 201, 397 P.2d 746 (1964) at page 747 (P.2d):

> "As to defendant's second contention that the trial court erred in sentencing him under C.R.S. '53, 39-19-1, when he pleaded guilty to C.R.S. '53, 40-2-32, he overlooks that these statutes are in *pari materia* and must be interpreted together. So reading them, it becomes readily apparent that an offender under 40-2-32 may be sentenced in accordance with the provisions of 39-19-1' . . . *if the district court is of the opinion* that any such persons, if at large, constitutes a threat of bodily harm to members of the public . . . ,' and the latter finding was expressly and justifiably made in this case." (Emphasis supplied.)

See also the statement of the court in *Ray v. People*, ... Colo. ...., 415 P.2d 328 (1966) at page 330 (P.2d):

> "After being apprised of the information *it is the court which finally makes the determination* whether the person, if at large, would constitute a threat of bodily harm to a member of the public. We stated in Trueblood, supra, that 'The trial court should consider all material matter before it which will aid in the formation of a proper "opinion."' This we hold, the trial court did. The information supplied to the court from the psychiatrist's first report and from the probation report and from other sources, including defendant's own counsel, supported its disposition of the case." (Emphasis supplied.)

The latest relevant statement is by the Circuit Court as follows:

> "The Colorado Sex Offender Act, 39-19-2, provides in substance that no person convicted of a crime punishable *in the discretion of the court* under the Act shall be sentenced until a psychiatric examination has ben made and a report submitted to the court of all the facts and findings together with recommendations as to whether the convicted person is treatable under the provisions of the Act and whether he should be committed or could be adequately supervised on probation. The statute does not provide or contemplate any hearing *on the exercise of the discretion of the court* to impose sentence under the Act in lieu of sentence authorized under 40-2-32.
>
> On the constitutional issue the contention is to the effect that one convicted of a 40-2-32 offense is en-

titled to a due process hearing *on the exercise of the discretion committed to the sentencing court . . . .*" *Specht v. Patterson*, 10th Cir., 357 F.2d 325, 326. (Emphasis supplied.)

As in *Vanderhoof*, likewise in the cases cited, the question of what label is attached to the process by which sentence is imposed was not a specific issue. The essence of the sentencing process, however, no matter what characterization is attached, is a determination in the discretion of the trial court.

Appendix "B"

Note 5.

The recommendation of responsible officials is that a sound system includes standards and classifications to guide the sentencing process. Representative thereof is the following:

> "Finally, few sentencing codes set forth criteria for distinguishing between the occasional and the aggravated or repeated offender. A clear definition of the circumstances under which, for example, it is appropriate to impose capital punishment or an extended prison term or to grant probation would help guide sentencing judges."

> "The Model Penal Code also contains sentencing criteria, as does the Model Sentencing Act drafted by the Council of Judges of the National Council on Crime and Delinquency."

> "Both the model code and the model act seek to establish criteria identifying the persistent, habitual, or hardened criminal. Framing statutory sentencing

standards is a complicated and laborious undertaking on which there still is much work to be done. Standards for many sentencing decisions cannot yet be articulated. However, it is an undertaking of great importance, and continued experimentation is likely to produce valuable results."

"The Commission recommends:

States should reexamine the sentencing provisions of their penal codes with a view to simplifying the grading of offenses, and to removing mandatory minimum prison terms, long maximum prison terms, and ineligibility for probation and parole. In cases of persistent habitual offenders or dangerous criminals, judges should have express authority to impose extended prison terms. Sentencing codes should include criteria designed to help judges exercise their discretion in accordance with clearly stated standards."

THE CHALLENGE OF CRIME
IN A FREE SOCIETY

A Report by the President's Commission on Law Enforcement and Administration of Justice, pages 142 and 143.

Note 16.

Petitioner cites Swanson's article in 51 *Crim. Law C. and P.S.* 215 with reliance. While we would agree with the ideals and standards therein expressed when applied to the *civil* sexual psychopath commitment proceedings, we disagree that this citation is apropos to the instant case. It is nonetheless significant that the concepts therein expressed with respect to the standards of classification of persons who fall within the purview of the Act are wholly

consistent with our position. See the following comment at page 226:

> "Hence, the following points are submitted for consideration. The statutes should change the designation of condition to 'Sexually Dangerous Persons', the reader realizing of course that what the offender is called is not nearly so crucial as what class of persons the statute shall include. 'Sexually Dangerous Persons' would include *any* person reflecting the existence of a mental disorder or personality disturbance coupled with propensities to commit *any* kind of sex crime which physically threatens others. The term 'Sexually Dangerous Persons' would thus include only those persons constituting a physical threat to other persons, hence leaving the less harmful offenders (e.g., exhibitionists, voyeurs, frotteurs, and fetishists) who do not constitute such a threat, to be dealt with by different legislation."

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CITATIONS

CASES:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 831

FRANCIS EDDIE SPECHT,

Petitioner,

vs.

WAYNE K. PATTERSON, Warden, et al.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Supplemental Statement on Questions Presented

Respondent's brief injects uncertainty and confusion into the case by contending that the issues as framed in the lower courts and on petition and response in this Court are not properly before the Court. The Attorney General says in his answer brief, page 2:

"... We do not agree with petitioner's assertion ... that petitioner was not afforded a hearing on his claims

as to what did or did not occur at that hearing. No official record of his sentencing hearing or hearings exists and no evidentiary hearing has been held by any court as to what did or did not occur at his hearing to impose sentence and, therefore, any questions in regard thereto are not properly before this Court."

The State correctly says no evidentiary hearing has ever been held to determine what occurred at Petitioner's sentencing. But the reason for this is that the State has consistently argued in this and other cases that due process does not apply to sentencing and the courts have consistently so held. The petition in this case was dismissed in the District Court on a point of law and without an evidentiary hearing. Chief Judge Arraj stated in his memorandum (R. 39-40) that although Petitioner's argument was not totally unpersuasive, his contentions had been considered thoroughly by the state courts and that the decision in *Trueblood* v. *Tinsley,* 316 F.2d 783 (10th Cir. 1963), and *Trueblood* v. *Tinsley,* 148 Colo. 503, 366 P.2d 655 (1961), *cert. denied,* 370 U.S. 929 (1962), upholding the constitutionality of the Sex Offender Sentencing Act bound the court.

The Court of Appeals stated the issue presented to it concisely as follows:

"The statute does not provide or contemplate any hearing on the exercise of the discretion of the court to impose sentence under the Act in lieu of sentence authorized under 40-2-32.

"On the constitutional issue the contention is to the effect that one convicted of a 40-2-32 offense is entitled to a due process hearing on the exercise of the discretion committed to the sentencing court."

and framed the questions on certiorari by its holding:

> "We uphold the constitutionality of the Act . . . .
>
> • • • • •
>
> "In determining whether a convicted person shall receive an indeterminate sentence based upon a recognized classification or a ten-year maximum sentence, the sentencing court is free to utilize investigational techniques unhampered by due process requirements." *Specht* v. *Patterson*, 357 F.2d 325, 326 (10th Cir. 1966), R. 49-50. (Citing *Williams* v. *New York*, 337 U.S. 241 (1949).)

Petitioner ultimately brought the case here on certiorari to obtain reversal of the Court of Appeals' decision that the State's position is correct and that *Williams* v. *New York* is controlling. He continues to assert that due process requires that he be afforded a right to a hearing with the right of confrontation, evidence production, and evidence testing by cross-examination either by explicit statutory guarantee or by judicial construction.

All courts below have thought that it is unnecessary and irrelevant to inquire into the procedural fairness of proceedings by which Petitioner and others like him have been sentenced. This case is here (1) to establish that such inquiry is relevant because due process does require a hearing and (2) to demonstrate that because Colorado and lower federal courts have interpreted the Sex Offender statute so as not to require any hearing, no defendant, including Petitioner, has been or will be afforded due process unless it is required to be done by this Court.

ARGUMENT

I.

The Colorado Sex Offender Sentencing Act Does Not Provide for a Hearing or for Disclosure of the Facts Relied on to Impose Its Enhanced Penalty and the Reported Decisions in Petitioner's Case Clearly Establish That His Attempts to Obtain These Rights Have Been Denied on the Ground That He Is Not Entitled to Them.

The State suggests throughout its brief that the Sex Offender statute provides for a hearing and that there is no reason to believe that Petitioner did not receive one in that the record does not disclose what occurred at his sentencing. See Brief for Respondents, pp. 2, 3, 5, 6, 11 and 17. The suggestion is simply erroneous. Nowhere does the statute provide for a hearing. What it does provide is an arraignment. See Section 39-19-5(1), Appendix A, Brief for Petitioner. Apparently this is what the State refers to on page 5 of its brief as "arraignment or hearing for imposition of sentence." That Petitioner had an arraignment at sentencing as opposed to the hearing for which Petitioner here contends conclusively appears in statements of the Colorado Supreme Court:

> "The record affirmatively discloses that Specht, along with his counsel, was present in open court when sentence was imposed and such is compliance with the statutory requirement that he be 'arraigned' at the time of sentence under C.R.S. '53, 39-19-1, et seq." *Specht* v. *Tinsley,* 153 Colo. 235, 385 P.2d 868 (1964).

To be contrasted is the Colorado Supreme Court's view of what constitutes a "hearing":

> "The word contemplates not only the privilege to be present when the matter is being considered *but the right to present one's contention and support the same by proof and argument.*" (Emphasis added.) *Brown* v. *Brown,* 422 P.2d 634, 635 (Colo. 1967).

The State's suggestion, in addition to being erroneous, constitutes a complete reversal of its position in the lower courts, both state and federal. The State, prior to its brief in this Court has always maintained that a defendant subject to the Sex Offender statute is not afforded a hearing and that it is absurd to suggest that due process requires a different rule.

> "Pellucidly, *Colorado's failure* to attach to the imposition of a sentence under the Sex Offenders Act all of the basic aspects of procedural due process offends no generally accepted concepts of basic standards of justice." Brief of Appellee, p. 6, *Specht* v. *Patterson,* 357 F.2d 325 (10th Cir. 1966). (Emphasis added.)

In a somewhat concessionary tone the State now suggests that "due process may require that defendant be given a copy of the psychiatrist's report and the pre-sentence report," and that, "It can be said that, unless such is done, no adequate opportunity to test the veracity of the informational process is afforded." See Brief for Respondent, p. 11. The State goes on to say that in this case the question is academic, and to create the impression that in Colorado the question is an open one which has not been presented to the Colorado courts, or that the state courts would afford a defendant these rights if he sought them

there. This is not accurate. Petitioner quotes the following from these same attorneys' brief to the Colorado Supreme Court in *Specht* v. *Tinsley*:

> "Under petitioner's fourth heading he alleges that the sentencing procedure denied him of equal protection of the laws and due process. His first basis for this attack is that at the time of sentencing he was not afforded due process. *This assertion is apparently based on the false premise that the sentencing must be conducted in accordance with the requirements of a trial, such as examination of the psychiatric report and right to cross-examine the expert submitting the report.* We know of no principle which requires an opportunity to be heard as to the information upon which a judge may properly rely or utilize in determining the proper sentence." Brief for Defendant-in-Error, p. 4, *Specht* v. *Tinsley*, 153 Colo. 235, 385 P.2d 423 (1963). (Emphasis added.)

Although the Colorado Court did not discuss this question in detail in its opinion, it upheld the statute against all due process attacks levelled by Specht. Having successfully argued to the Colorado court that Specht's assertions there were based on a "false premise," the Attorney General now seeks to concede enough of the point to avoid a decision here while maintaining his former position with the assertion that the point is academic.

II.

Equal Protection Requires the Retention of Classification Standards in the Sex Offender Statute; Due Process Requires the Employment of a Fair Procedure to Determine Factually Whether Petitioner Is Within the Class Punished by the Statute.

Petitioner has contended that the Sex Offender Sentencing Act requires a finding of fact which is separate from and in addition to facts required to be found for the original conviction, and that the Act unconstitutionally permits the finding of fact without a hearing incorporating procedural fairness. The State argues, however, that if Colorado eliminated the classifications in the Act and placed the imposition of the alternative sentence within the discretion of the trial court or amended the Indecent Liberties Act so as to provide within it the alternative sentence now provided in the Sex Offender Sentencing Act, Petitioner's argument would evaporate.

The Colorado Legislature has not so amended the Indecent Liberties Act or the Sex Offender Sentencing Act. Furthermore, no such easy device exists by which to dispel Petitioner's argument as is suggested by Respondent. Initially, equal protection requires classification upon some rational basis for distinguishing Petitioner from others convicted of sex crimes, but not sentenced under the challenged Act. *Morey* v. *Doud,* 354 U.S. 457 (1957); *Walters* v. *St. Louis,* 347 U.S. 231 (1954); *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61 (1911); *Trueblood* v. *Tinsley,* 148 Colo. 503, 366 P.2d 655 (1961); *Vanderhoof* v. *People,* 152 Colo. 147, 380 P.2d 903 (1963).

In the *Vanderhoof* case the Sex Offender statute was upheld *because* it contained the very legislative classifications which the State now lightly proposes might be eliminated in order to defeat Petitioner's contention. In order to overcome an argument in that case that the classification in the statute is arbitrary because it is determined in the discretion of the court, the same attorneys who represent Respondent here said:

> "The classification is not determined by the trial court. The trial court makes a finding of fact only to determine whether or not a defendant comes within the classification set forth in the Act."

Brief of Defendant in Error, p. 2, *Vanderhoof* v. *People*, 152 Colo. 147, 380 P.2d 903 (1963). Now that Petitioner has suggested that the finding of fact is a critical one which permits an enhanced sentence and should, therefore, be clothed with the requirements of fairness embodied in due process, the State seeks to minimize its importance by calling the fact-finding process a label attached by Petitioner to the thought processes of the sentencing judge in determining sentence. See Brief for Respondent, p. 16. Such inconsistency cannot go unchallenged. It is the State's interpretation of the Act which has been uniformly accepted by the Colorado Supreme Court in its decisions and has been imported into the law by administration and application.

The point which Petitioner is accused of belaboring is that the process by which he is determined to be within the statutory classification must be governed by rules of elementary fairness. The State apparently represents to the Court that "responsible officials" recommend procedures

such as the ones followed in Colorado. See Brief of Respondent, Appendix B, referring among other things to the Model Penal Code.

Indeterminate terms of sentence similar to that imposed upon Petitioner are dealt with by the Model Penal Code in terms of an "extended term" of imprisonment as a device for dealing with the more difficult criminal. See A.L.I. MODEL PENAL CODE, § 6.07 and Comments 1-4, pp. 23-26, and § 7.03 and Comment 1, pp. 37-38, T.D. No. 2 (1954). See also A.L.I. MODEL PENAL CODE, § 6.07, p. 43 and § 7.03, p. 49, T.D. No. 4 (1955). The Code authorizes an extended sentence for a term of years, varying between stated minima and maxima depending on the degree of crime, if the court finds that the defendant is a persistent offender, a professional criminal, or a dangerous mentally abnormal person, whose commitment for an extended term is necessary for protection of the public. The procedures established in the Model Penal Code for imposing the extended sentence differ greatly from Colorado procedure. They are set forth in A.L.I. MODEL PENAL CODE, § 7.07, T.D. No. 2, p. 52 (1954); T.D. No. 4, p. 55 (1955). Section 7.07 is entitled "Procedure on Sentence; Pre-Sentence Investigation and Report; Remand for Psychiatric Examination; Transmission of Records to Department of Correction."

Subsections 5 and 6 are directly pertinent to the present case and provide as follows:

> "(5) Before imposing sentence, the Court *shall advise the defendant* or his counsel of the factual contents and conclusions of any pre-sentence investigation or psychiatric examination *and afford fair opportunity*, if the defendant so requests, *to controvert them.* The

sources of confidential information need not, however, be disclosed.

"(6) The Court shall not impose a sentence for an extended term unless the ground therefor has been established *at a hearing* after the conviction of the defendant *and on written notice to him of the ground proposed.* Subject to the limitation of paragraph (5) of this section, *the defendant shall have the right to hear and controvert the evidence against him and to offer evidence upon the issue.*" (Emphasis added.)

The reporter comments that disclosure of the factual contents and conclusions of the pre-sentence report and psychiatric report are essential to elementary fairness. He recommends that "fairness demands a hearing focused on the precise question of the existence of the grounds for such a sentence, with notice to the defendant of the ground proposed." A.L.I. MODEL PENAL CODE, § 7.07, Comments 2 and 3, pp. 54-55, T.D. No. 2 (1954). See also § 7.03, Comment, p. 42, T.D. No. 2 (1954), to the effect that due process *requires* a hearing. In the case cited by the Reporter, *United States* v. *Claudy,* 204 F.2d 624 (3d Cir. 1953), the question was whether due process required notice and hearing prior to imposition of an enhanced penalty for a second offense. Speaking of sentencing procedure the Court said:

"It is reasoned that at this stage the court is determining the extent of culpability after guilt of a crime has been established. Accordingly, the tendency has been to move from the stringent requirements of due process before conviction toward the greater latitude normally allowed in sentencing in cases like *Williams*

> v. *People of State of New York*, 1949, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337, *where, in the absence of any question of possible liability to enhanced penalty,* the sentencing judge is permitted to fix punishment, up to a statutory maximum *already authorized by the verdict* . . . without informing the convicted person what data is being considered or granting him any hearing thereon. At the same time it is established *that even after conviction the due process clause imposes some significant restraint to assure the essential fairness of the procedure by which a judge shall exercise discretion in fixing* punishment within permissible limits . . . .
>
> "Such restraint is the more imperative . . . when the challenged sentence cannot lawfully be imposed upon the basis of the finding of guilty as charged in the indictment without more. *Here there remains after conviction an issue to be tried with facts to be proved in order to elevate the offense to the aggravated class defined and punished by the Habitual Criminal Act.*" 204 F.2d 624, 627-628.

This interpretation of what is required by elementary fairness fully comports with Petitioner's. He seeks by way of relief nothing more than a judicial declaration that elementary fairness, in the form of due process of law, require disclosure to him of the grounds upon which it is proposed that he be sentenced and an opportunity such as is given in Section 7.07 of the Model Penal Code and in *Claudy* to test and rebut the information on which the court acts in imposing an extended sentence.

Conclusion

Petitioner has unsuccessfully argued to the lower courts that persons convicted of a crime may not constitutionally be subjected to enhanced penalties unless the State provides a fair procedure incorporating hearing, disclosure of evidence used against them, and the right to rebut such evidence by cross-examination and by production of evidence of their own.

Respondent has successfully argued that since due process does not pertain to the sentencing process, it is irrelevant to inquire into the question of what constitutes a fair procedure for enhanced penalty sentencing.

Petitioner was sentenced under Respondent's theory of the law and all his attempts to challenge that theory have been summarily rejected on the basis of Respondent's premise that due process does not pertain to sentencing.

Under the authority of this Court's rule in *Williams* v. *New York*, the lower courts have permitted Petitioner and others to be sentenced to enhanced punishments without the procedural safeguards sought by Petitioner. It has become necessary for this Court (1) to clarify the extent, if any, to which *Williams* v. *New York* applies to recidivism, mental abnormality and other like criminal proceedings, (2) to decide whether defendants in those proceedings have any due process rights, and (3) to specify what, if any, rights may be afforded.

Petitioner submits that recent decisions of this Court in *Oyler* v. *Boles*, 368 U.S. 448 (1962); *Chandler* v. *Fretag*, 348 U.S. 3 (1959); and *Kent* v. *United States*, 383 U.S. 541 (1966), clearly point the way for decision in his case. The decision of the Court of Appeals must be reversed.

Respectfully submitted,

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MICHAEL A. WILLIAMS
GARY L. GREER
Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES

No. 831.—October Term, 1966.

Francis Eddie Specht, Petitioner, v. Wayne K. Patterson, Warden, et al. | On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[April 11, 1967.]

Mr. Justice Douglas delivered the opinion of the Court.

We held in *Williams* v. *New York*, 337 U. S. 241, that the Due Process Clause of the Fourteenth Amendment did not require a judge to have hearings and to give the convicted person an opportunity to participate in those hearings when he came to determine the sentence to be imposed. We said:

> "Under the practice of individualizing punishments, investigational techniques have been given an important role. Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders. Their reports have been given a high value by conscientious judges who want to sentence persons on the best available information rather than on guesswork and inadequate information. To deprive sentencing judges of this kind of information would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation. We must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition

> of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to cross-examination. And the modern probation report draws on information concerning every aspect of a defendant's life. The type and extent of this information make totally impractical if not impossible open court testimony with cross-examination. Such a procedure could endlessly delay criminal administration in a retrial of collateral issues." *Id.*, 249–250.

That was a case where at the end of the trial and in the same proceeding the fixing of the penalty for first degree murder was involved—whether life imprisonment or death.

The question is whether the rule of the *Williams* case applies to this Colorado case where petitioner, having been convicted for indecent liberties under one Colorado statute that carries a maximum sentence of 10 years (Colo. Rev. Stat. Ann. § 40–2–32 (1963)) but not sentenced under it, may be sentenced under the Sex Offenders Act Colo. Rev. Stat. Ann. §§ 39–19–1 to 10 (1963), for an indeterminate term of from one day to life without notice and full hearing. The Colorado Supreme Court approved the procedure, when it was challenged by habeas corpus (153 Colo. 235, 385 P. 2d 423) and on motion to set aside the judgment. 156 Colo. 12, 396 P. 2d 539. This federal habeas corpus proceeding resulted, the Court of Appeals affirming dismissal of the writ, 357 F. 2d 325. The case is here on a petition for certiorari, 385 U. S. 968.

The Sex Offender Act may be brought into play if the trial court "is of the opinion that any . . . person (convicted of specified sex offenses) if at large, constitutes a threat of bodily harm to members of the public, or is an habitual offender and mentally ill." § 1. He then becomes punishable for an indeterminate term of from

one day to life on the following conditions as specified in § 2:

> "(1) A complete psychiatric examination shall have been made of him by the psychiatrists of the Colorado Psychopathic Hospital or by psychiatrists designated by the district court and
>
> "(2) A complete written report thereof submitted to the district court. Such report shall contain all facts and findings, together with recommendations as to whether or not the person is treatable under the provisions of this article; Whether or not the person should be committed to the Colorado State Hospital or to the State Home and Training Schools as mentally ill or mentally deficient. Such report shall also contain the psychiatrist's opinion as to whether or not the person could be adequately supervised on probation."

This procedure was followed in petitioner's case; he was examined as required and a psychiatric report prepared and given to the trial judge prior to the sentencing. But there was no hearing in the normal sense, no right of confrontation and so on.

Petitioner insists that this procedure does not satisfy due process because it allows the critical finding to be made under § 1 of the Sex Offenders Act (1) without a hearing at which the person so convicted may confront and cross-examine adverse witnesses and present evidence of his own by use of compulsory process, if necessary; and (2) on the basis of hearsay evidence to which the person involved is not allowed access.

We adhere to *Williams* v. *New York, supra;* but we decline the invitation to extend it to this radically different situation. These commitment proceedings whether denominated civil or criminal are subject both to the Equal Protection Clause of the Fourteenth Amendment

as we held in *Baxstrom* v. *Herold*, 383 U. S. 107, and to the Due Process Clause. We hold that the requirements of due process were not satisfied here.

The Sex Offenders Act does not make the commission of an enumerated crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another Act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. That is a new finding of fact (*Vanderhoof* v. *People*, 152 Colo. 147, 149, 380 P. 2d 902, 904) that was not an ingredient of the offense charged. The punishment under the second Act is criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm.[1] *United States* v. *Brown*, 381 U. S. 437, 458.

The Court of Appeals of the Third Circuit in speaking of a comparable Pennsylvania statute[2] said:

> "It is a separate criminal proceeding which may be invoked after conviction of one of the specified

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[1] Provisions for probation are provided (Colo. Rev. Stat. Ann. § 39–19–5–(3) (1963)); and the Board of Parole has broad powers over the person sentenced. (Colo. Rev. Stat. Ann. §§ 39–19–6 to 10 (1963)).

[2] The Pennsylvania statute (Pa. Stat., Tit. 19, §§ 1166–1174 (1964)) provides that if a court is of the opinion that a person convicted before it of certain sex offenses would "if at large, constitute a threat of bodily harm to members of the public, or is an habitual offender and mentally ill," it may "in lieu of the sentence now provided by law," sentence the person to a state institution for an indeterminate period, from one day to life. Pa. Stat., Tit. 19, § 1166 (1964). The sentence is imposed only after the defendant has undergone a psychiatric examination and the court has received a report containing all the facts necessary to determine whether it shall impose the sentence under the act. Pa. Stat., Tit. 19, § 1167 (1964). If the court, after receiving the report, "shall be of the opinion that it would be to the best interests of justice to sentence

crimes. Petitioner therefore was entitled to a full judicial hearing before the magnified sentence was imposed. At such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. He must be afforded all those safeguards which are fundamental rights and essential to a fair trial, including the right to confront and cross-examine the witnesses against him." *Gerchman* v. *Maloney*, 355 F. 2d 302, 312.

We agree with that view. Under Colorado's criminal procedure, here challenged, the invocation of the Sex Offenders Act means the making of a new charge leading to criminal punishment. The case is not unlike those under recidivist statutes where an habitual criminal issue is "a distinct issue" (*Graham* v. *West Virginia*, 224 U. S. 616, 625) on which a defendant "must receive reasonable notice and an opportunity to be heard." *Oyler* v. *Boles*, 368 U. S. 448, 452; *Chandler* v. *Fretag*, 348 U. S. 3, 8. Due process, in other words, requires that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed. The case is therefore quite unlike the Minnesota statute [3] we considered in *Minnesota* v.

such person under the provisions of [the] act, he shall cause such person to be arraigned before him and sentenced to" a state institution designated by the Department of Welfare. Pa. Stat., Tit. 19, § 1170 (1964). After a person is sentenced under the act, the state Board of Parole has exclusive control over him. Pa. Stat., Tit. 19, § 1173 (1964).

[3] The Minnesota statute (Chapter 369 of the Laws of Minnesota of 1939) provided that the laws relating to persons found to be

Probate Court, 309 U. S. 270, where in a proceeding to have a person adjudged a "psychopathic personality" there was a hearing where he was represented by counsel and could compel the production of witnesses on his behalf. *Id.*, at 275. None of these procedural safeguards we have mentioned is present under Colorado's Sex Offender Act. We therefore hold that it is deficient in due process as measured by the requirements of the Fourteenth Amendment. *Pointer* v. *Texas*, 380 U. S. 400.

Reversed.

MR. JUSTICE HARLAN agrees with this opinion, but upon the premises set forth in his opinion concurring in the result in *Pointer* v. *Texas*, 380 U. S. 400, 408.

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insane were to apply to "persons having a psychopathic personality." It defined the term "psychopathic personality" as meaning the existence in a person of certain characteristics which rendered him "irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons." The statute was not criminal in nature, and was not triggered by a criminal conviction. A person found to have a "psychopathic personality" would be committed, just as a person found to be insane. See Mason's Minn. Stat. c. 74, § 8992–176 (1938 Supp.).